This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

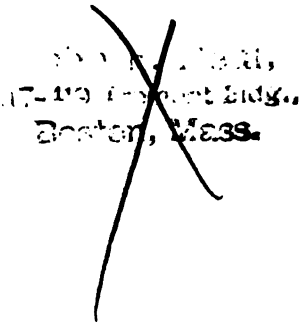
About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

HARVARD LAW LIBRARY
3 2044 066 099 946

Digitized by Google

USHER A. MOREN
ATTORNEY-AT-LAW



HARVARD LAW LIBRARY

Digitized by Google

Digitized by Google

Digitized by Google

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

By OCTAVIUS PICKERING,

COUNSELLOR AT LAW.

VOLUME XIV.

BOSTON:
LITTLE, BROWN AND COMPANY.
1863.

Digitized by Google

Entered according to act of Congress, in the year 1838,
by Octavius Pickering,
in the Clerk's office of the District Court of the District of Massachusetts.

Digitized by Google

TABLE

OF THE CASES REPORTED.

Abbot *et al.* (Cobb *v.*) - 289
Adams *et al. v.* Cruft *et al.* - 16
Allen (Davis *v.*) - - 313
American Bank *v.* Doolittle - 123
Anthony *v.* County Commissioners of Berkshire - 189
Anthony *v.* Wilson *et al.* - 303
Atlas Insurance Company (Eager *v.*) - - - - 141
Avery *v.* Halsey - 174
Aylwin (Taft v.) 336

Bancroft (Cary *v.*) - - 315
Barber (M'Gee *v.*) - 212
Bartholomew *v.* Candee - 167
Bates *v.* Norcross - - 224
Benjamin (Pierce *v.*) - - 356
Berkshire, County Commissioners of (Anthony *v.*) - 189
Biglow (Parker *v.*) - - 436
Bissell (Varnum *et al. v.*) 191
——— *et al.* (Turner *v.*) 192
Blake *et al.* (Root *et al. v.*) 271
Bradford (Scudder *et al. v.*) 13
Brainard (Chandler *et al. v.*) 285
Brewer (Parks *v.*) - - 192
——— *v.* The Inhabitants of Tyringham - - - 196
Bridge *et al. v.* Gray *et al.* 55
Brooks (Wilson *et al. v.*) 341
Brown (Seeley *v.*) - - 177
Brown (Tuttle *v.*) - - - 514
——— *et al.* (Corbin *v.*) 306
Buffum *et al.* (Taft *v.*) - 322
Burns *et al. v.* Fay - - 8
Butler and Trustee (Willard *v.*) 550

Cady *et al. v.* Norton - 236
Candee (Bartholomew *v.*) - 167
Card (Hunt *v.*) - - 135
Carpenter *v.* Heard *et al.* - 449
Carter *v.* Carter - - 424
Cary *v.* Bancroft - - 315
Catlin (Rice *v.*) - - 221
Chandler *et al. v.* Brainard 285
Cheney (Fay *et al. v.*) - 399
Clark *et al.* (Lord *et al. v.*) 223
Cobb *v.* Abbot *et al.* - 289
Commonwealth *v.* Lang - 76
——————— *v.* Locke - 485
——————— *v.* Merriam 518
——————— *v.* Stephens - 370
Corbin *v.* Brown *et al.* - 306
Cruft *et al.* (Adams *et al. v.*) 16
Cutler *v.* Middlesex Factory Company - - - 483
——— *et al.* (Emerson *v.*) 108
——— *v.* Rice - - 494

Davis *v.* Allen - - 313
——— (Thomas - - 353
Dick, *Ex Parte* 26

Digitized by Google

Dickinson *v.* Hall - - 217
——— (Scott *v.*) - 276
Doolittle (American Bank *v.*) 123
Drury *et al. v.* Fay - - 326
——— (Sigourney *v.*) 387

Eager *v.* Atlas Insurance Company - - - - 141
Eastman *v.* Winship *et al.* 44
Eaton (Sigourney *v.*) - 414
——— *v.* Simonds - - 98
Emerson *v.* Cutler *et al.* - 108

Fay (Burns *et al. v.*) - 8
—— (Drury *et al. v.*) - 326
—— *et al. v.* Cheney - - 399
Field *v.* Hitchcock - - 405
Fiske *v.* Framingham Manufacturing Company - - 491
Flagg *v.* Mann *et al.* - 467
Fletcher (Mayo *et al. v.*) - 525
——— *v.* Willard - 464
Foster *et al.* (Haven *et al. v.*) 534
——— (Haven *et ux. v.*) 534
Fowler *et al.* (King *v.*) - 238
Framingham Manufacturing Company (Fiske *v.*) - 491

Goddard *v.* Johnson - - 352
——— *v.* Lyman - 268
——— (Rice *v.*) - - 293
Gold *v.* Whitcomb *et al.* - 188
Gray *et al.* (Bridge *et al. v.*) 55
Grout *et al. v.* Hapgood *et al.* 345

Hadley, The Inhabitants of *v.* Hopkins Academy - - 240
Hall (Dickinson *v.*) - - 217
—— (Jackson *v.*) - - 151
Halsey (Avery *v.*) - - 174
Hancock *et al. v.* Hancock 70
Hapgood *et al.* (Grout *et al. v.*) 345
——— (Jennison *v.*) 345
——— (Saunderson *v.*) 345
Harteau *v.* Harteau - - 181
Hatton *v.* Robinson - - 416
Haven *v.* Snow - - 28
——— *et al. v.* Foster *et al.* 534
Haven *et ux. v.* Foster *et al.* 534
Heard *et al.* (Carpenter *v.*) 449
Hemmenway *v.* Wheeler - 408
Hemmingway (Sproul *et al. v.*) 1
Hill (Oakes *v.*) - - 442
Hitchcock (Field *v.*) - - 405
Hodges *et al.* and Trustees (Stone *v.*) - - - 81
Hopkins Academy (The Inhabitants of Hadley *v.*) - 240
Howe *v.* Lewis - - 329
Hunt *v.* Card - - - 135
—— *v.* Hunt *et al.* - - 374

Jackson *v.* Hall - - - 151
Jennison *v.* Hapgood *et al.* 345
Jewett (Shearer *v.*) - - 232
Johnson (Goddard *v.*) - - 352

King *v.* Fowler *et al.* - 238
Knowlton *et al.* (Parks *et al. v.*) - - - - 432

Leach *v.* Woods - - 461
Leonard *v.* Leonard 280
Lewis (Howe *v.*) - - 329
Locke (Commonwealth *v.*) 485
Lord *v.* Tyler - - - 156
Lord *et al. v.* Clark *et al.* - 223
Lyman (Goddard *v.*) - 268

M'Gee *v.* Barber - - 212
M'Lellan (Russell *v.*) - 63
Macomber *et al. v.* Parker - 497
——— (Tudor *v.*) 34
Mann *et al.* (Flagg *v.*) - 467
Marchant (Worcester *et ux. v.*) 510
Mayo *et al. v.* Fletcher - 525
——— *v.* Shattuck - 525
Merriam (Commonwealth *v.*) 518
Middlesex Factory Company (Cutler *v.*) - - - 483

Newell (Townsend *v.*) - 332
Norcross (Bates *v.*) - - 224
Norton (Cady *et al. v.*) 236

Oakes *v.* Hill - - 442

Digitized by Google

Paine, Judge &c., *v.* Parsons 318
Parish *v.* Stone - - - 198
Parker *v.* Biglow - - 436
——— (Macomber *et al. v.*) 497
Parks *v.* Brewer - - - 192
——— *et al. v.* Knowlton *et al.* 432
Parsons (Paine, Judge &c., *v.*) 318
Pierce *v.* Benjamin - - 356
——— *v.* Saxton - - 274

Rice *v.* Catlin - - 221
——— (Cutler *et al. v.*) - 494
——— *v.* Goddard - - 293
——— (Stearns *v.*) - - 411
Richardson (Sanders *v.*) - 522
Robinson (Hatton *v.*) - - 146
Root *et al. v.* Blake *et al.* - 271
Roys (Sherwood *v.*) - - 172
Russell *v.* M'Lellan - 63
———, The Inhabitants of (Tinker *v.*) - - - - - 279

Sanders *v.* Richardson - 522
Saunderson *v.* Hapgood *et al.* 345
Saxton (Pierce *v.*) - - 274
Scott *v.* Dickinson - - 276
Scudder *et al. v.* Bradford - 13
Seeley *v.* Brown - - - 177
Seymour, *Ex Parte* - - 40
Shattuck (Mayo *et al. v.*) - 525
Shearer *v.* Jewett - - 232
Sherwood *v.* Roys - - 172
Shrewsbury, The First Parish in *v.* Smith - - - 297
Sigourney *v.* Drury *et al.* - 387
——— *v.* Eaton - - 414
Simonds (Eaton *v.*) - - 98
Smith (The First Parish in Shrewsbury *v.*) - - 297
——— *v.* Strong - - - 128
Snow (Haven *v.*) - - 28
Sproul *et al. v.* Hemmingway 1
Stearns *v.* Rice - - - 411
Stephens (Commonwealth *v.*) 370
Stevens, *Ex Parte* - - 94
Stone *v.* Hodges *et al.* and Trustees - - - 81
——— (Parish *v.*) - - 198
Strong (Smith *v.*) - - 128

Taft *v.* Aylwin - - - 336
——— *v.* Buffum *et al.* - 322
——— *v.* Wood *et al.* - - 362
Thaxter *v.* Williams *et al.* 49
Thomas *v.* Davis - - 353
Townsend *v.* Newell - - 332
Tinker *v.* The Inhabitants of Russell - - - 279
Tudor *v.* Macomber *et al.* - 34
Turner *v.* Bissell *et al.* - 192
Tuttle *v.* Brown - - - 514
Tyler (Lord *v.*) - - 156
Tyringham, The Inhabitants of (Brewer *v.*) - - - 196

Varnum (Whitehead *v.*) - 523
——— *et al. v.* Bissell - 191

Wheeler (Hemmenway *v.*) 408
——— *et al. v.* Willard - 486
Whitcomb *et al.* (Gold *v.*) 188
White, *Ex Parte* - - 90
Whitehead *v.* Varnum - 523
Willard *v.* Butler and Trustee 550
——— (Fletcher *v.*) - 464
——— (Wheeler *et al. v.*) - 486
Williams *et al.* (Thaxter *v.*) 49
Wilson *et al.* (Anthony *v.*) 303
——— *v.* Brooks - 341
Winship *et al.* (Eastman *v.*) 44
Wood *et al.* (Taft *v.*) - - 362
Woods (Leach *v.*) - - 461
Worcester *et ux. v.* Marchant 510

Digitized by Google

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTIES OF SUFFOLK AND NANTUCKET, MARCH TERM 1833, AT BOSTON.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE,
HON. SAMUEL PUTNAM,
HON. SAMUEL S. WILDE,
HON. MARCUS MORTON,
} JUSTICES.

WILLIAM SPROUL *et al. versus* AUGUSTUS HEMMINGWAY.

A brig, which was towed at the stern of a steamboat employed in the business of towing vessels in the river Mississippi, below New Orleans, was, through the negligence of the master and crew of the steamboat, over whom those in charge of the brig had no control, brought into collision with a schooner lying at anchor. It was *held*, that the owner of the brig was not responsible for the damage sustained by the schooner.

THIS was an action upon the case, in which the plaintiffs, as owners of the schooner Triton, claimed compensation for damages sustained by that vessel in consequence of being run against by a brig, called the Burton, belonging to the defendant.

At the trial, before *Shaw* C. J., it appeared, that on the evening of April 13, 1828, while the Triton was lying at anchor in the river Mississippi, about eight or nine miles

Digitized by Google

Sproul v. Hemmingway.

below New Orleans, the steamboat Grampus came down, having a ship lashed upon each side, and the Burton towed astern by a hawser of about thirty fathoms in length; that the steamboat passed so near the schooner that the ship on her larboard side just cleared the schooner, and the collision between the brig and the schooner took place, which is the ground of this action. Both vessels sustained damage, that of the schooner amounting to a sum between six hundred and seven hundred dollars.

There was evidence tending to show, that, in consequence of the negligence and bad management of those who had the care and conduct of the steamboat, the vessel in tow, without any culpable negligence or unskilfulness of those who had charge of her, was thrown out of the track of the steamboat and so caused the collision. In reference to which, the jury were instructed, that if this collision took place through the negligence, unskilfulness or misconduct of those who had charge of the steamboat, the owner of the Burton was not liable in this action. The plaintiffs excepted to this instruction.

It appeared that the Grampus was a tow steamboat, and that it was customary for masters of vessels to employ steamboats of this sort to tow them in the river; and that the owner of the Burton, who was on board at the time of the collision, contracted with the master of the Grampus, for the towage of the Burton to the mouth of the river.

The jury found a verdict for the defendant.

March 6th. *H. H. Fuller* and *W. R. P. Washburn* for the plaintiffs. The owner of the Burton was liable for the acts of the master and crew of the steamboat, who were, for the time, his servants, employed and paid by him He elected to be towed by the steamboat, and thus voluntarily placed his vessel in a situation in which she would be more dangerous to others. In this respect this case is stronger than that of an innkeeper, who is liable not only for the acts of his servants, whom he selects, but for the acts of travellers, whom he may be compelled to receive.

It is true, that the master of the steamboat was not appointed by the defendant, and was not under his control; but

Digitized by Google

the same objection applies in the case of a pilot, and yet the owner of the vessel is held to be responsible for the acts of the pilot who may have charge of his vessel. *Yates* v. *Brown*, 8 Pick. 23, cites *Snell* v. *Rich*, 1 Johns. R. 305. There might be a question as to the liability of the masters of the Grampus and Burton, but there can be none as to that of the *owner* of the Burton. *Stone* v. *Cartwright*, 6 T. R. 411; *Bush* v. *Steinman*, 1 Bos. & Pul. 404; 2 Dane's Abr. 511; *Fletcher* v. *Braddick*, 5 Bos. & Pul. 182; *Nicholson* v. *Mounsey*, 15 East, 384; Code Napoleon, *liv.* 3, *tit.* 4, § 1384.

Even if the master of the steamboat is to be considered as the agent of the owner of the steamboat, still we contend that the owner of the Burton is responsible for his acts; for where an agent hires a sub-agent, the principal becomes responsible for the acts of the sub-agent. 2 Kent's Comm. 210; *Matthews* v. *West London Water Works Co.*, 3 Campb. 403. Reasons of public policy also require that the defendant should be held liable. *Bush* v. *Steinman*, 1 Bos. & Pul. 404; *Yates* v. *Brown*, 8 Pick. 23.

It may be said that this is like the case of goods on board a freighting ship, or lashed to a vessel, as lumber, in which case the owner of the goods or lumber would not be responsible for damage done by the ship. But we think this is not an analogous case; for here the Burton was steered and navigated, just as much as if she had not been in tow; it is not as if she had been put on board the steamboat.

C. G. Loring, for the defendant, cited *Laugher* v. *Pointer*, 5 Barn. & Cressw. 547; *S. C.* 8 Dowl. & Ryl. 556, and cases cited; *St.* 6 *Geo.* 4, *c.* 125, altering the law in regard to the liability of the owner of a vessel for the acts of the pilot.

SHAW C. J. delivered the opinion of the Court. The plaintiffs contest the correctness of the instruction of the judge to the jury, and insist that the owners, officers and crew of the steamboat, must be taken to have been, for the time being, the agents and servants of the defendant, entrusted with the navigation and management of his vessel, and therefore he is within the rule, that where a stranger suffer-

March 2d

Digitized by Google

Sproul v. Hemmingway.

damage, by the negligence or unskilfulness of another's agent or servant, the owner or employer shall stand chargeable for the damage.

This question has been ably argued, and it certainly must be considered as one not free from difficulty. The maxim *respondeat superior* in such cases, is well settled; but the difficulty consists in determining what facts and circumstances, in legal contemplation, go to establish the relation of superior and subordinate, of master and servant, or employer and employee, in such a manner as to give effect and application to the rule. This greatly vexed question has been very much discussed; and there are two modern cases, in which it is believed that the authorities are fully reviewed and considered. *Steinman* v. *Bush*, 1 Bos. & Pul. 404; *Laugher* v. *Pointer*, 5 Barn. & Cressw. 547; *S. C.* 8 Dowl. & Ryl. 556. The former was decided mainly on the ground, that the defendant was the owner of the house, under repair by persons employed directly or indirectly by him, and that the damage arose from carelessness in placing the materials intended for those premises, on or near them, in such manner as to frighten the plaintiff's horse. It was decided principally on the ground, that the owner of real estate must be taken to be the employer of all those, who are engaged in making repairs for him; and that having the power to control and regulate the use of his own estate, he is bound to do it, in such a manner, that others may not be injured by the mode in which it is used.

In the other case, where the owner of a coach had engaged horses and a driver for the day, and the damage was occasioned by the negligence of such driver, the question was whether the owner of the carriage or the owner of the horses, was responsible. The learned judges of the King's Bench were equally divided, and there was great difference of opinion among the other judges who were consulted. Without attempting to trace the origin of this principle or review the authorities, I shall refer to those two cases, as giving a full and comprehensive view of the argument and authorities, and proceed to state the decision of the Court, upon the present question, with some of the reasons upon which it is founded.

Digitized by Google

The case of a vessel towed by a steamboat, is certainly new in its facts, and could not have been anticipated by the founders of the common law; but it is one of the advantages of the common law, that it depends upon plain, equitable and practicable principles adapted to all times and occasions, and broad and comprehensive enough to embrace new cases as they arise. The decision of this case therefore must depend upon the application of established principles and analogous cases.

The owners of a vessel or coach are held liable for damages to third persons, occasioned by the negligence or unskilfulness of those who are in the management of the ship or coach;

1. Either because they are engaged or employed by them, are subject to their order, control and direction, and so are to be deemed, either generally or for the particular occasion, their servants;

2. Or, in respect to their being engaged in the business or employment of the owners, conducting and carrying on such business for the profit or pleasure of the owners, by reason of which the acts done in the prosecution of such business, shall be taken *civiliter* to be done by the employers themselves, and this, whether the persons whose negligence is the cause of damage, have been retained and employed by the principal himself, or by the procuration of others, employed by him for the purpose.

Tried by either of these principles, we think that the defendant is not responsible for damages, attributable to the carelessness or want of skill of the master and crew of the towing vessel. They were not the servants of the defendant; were not appointed by him; did not receive their wages or salaries from him; the defendant had no power to remove them; had no power to order or control them in their movements; had no contract with them, but only through them, with the owners of the steamboat, for a participation in the power, derived from the public use and employment of that vessel, by her owners. After making such contract, it was perfectly in the power of the owners of the steamboat, to appoint another master, pilot and crew, and the defendant would have had no cause of complaint.

Digitized by Google

Sproul v. Hemmingway.

3. Nor can the master and crew of the steamboat, in any intelligible sense, be considered as in the employment or business of the defendant, any more than a general freighting ship, her officers and crew, can be considered as in the employment of each freighter of goods, or the master and crew of a ferry-boat, in the employment of the owners of each coach, wagon or team transported thereon.

The steamboat was engaged in an open, public, distinct branch of navigation, that of towing and transporting vessels up and down the Mississippi, for a certain toll or hire, for the profit of the owners. The defendant seemed to have the same relation to the steamboat, that a freighter has to a general ship, or a passenger to a packet. The defendant participated in the benefit but incidentally and collaterally; he did not share in the profits of the business, one which from its magnitude may well be called the trade of towing. Such a trade may be considered as much a public and distinct employment, as that of freighting or conveying passengers.

The steamboat was in no sense in the possession of those whom she was employed to tow. If it is contended, that the defendant is liable on the ground, that the steamboat was, for the time being, in his possession, occupation or employment, then it would follow that the defendant would be liable for the negligence of the officers and crew of the steamboat, as well whether the plaintiff's vessel was struck by the defendant's vessel, the Burton, as struck by either of the other vessels towed, or by the steamboat herself; which cannot for a moment be contended.

The case may well be illustrated by considering the condition of one of the side vessels, firmly lashed to the steamboat, and governed wholly by its movements. The payment for the privilege of being thus moved or transported, is precisely like freight paid, for heavy luggage, timber or spars, for instance, carried in or upon a ship. The whole conduct and management is entirely under the control of the master and crew of the towing vessel in the one case, as it is of the freighting ship, in the other. If collision takes place between the side ship, thus firmly lashed, and another vessel, it is as directly attributable to the steamboat, and her officers and

Digitized by Google

crew, as if the steamboat herself had come into collision with the other vessel. The towed ship is the passive instrument and means, by which the damage is done. But there is no difference, in this respect, between the condition of one of the side ships, and a ship towed astern, except this; that on board the ship towed astern by means of a cable, something may and ought to be done by the master and crew, in steering keeping watch, observing and obeying orders and signs, and if there be any want of care and skill in the performance of these duties, and damage ensue, then the case we have been considering does not exist; the damage is attributable to the master and crew of the towed ship, and they and their owners must sustain it. The jury were so instructed at the trial, and it was left to them to find whether the damage was caused by the negligence of the one or the other. Then supposing all duties faithfully performed on board the towed vessel, and the damage to be caused by the negligence or misconduct of the master and crew of the steamboat, there is no difference between the case of the side-ship, which is wholly passive, and the ship astern, which is partially so.

The case most nearly resembling this, perhaps, is that of a vessel chartered, where for a certain time the whole use and benefit of the ship is transferred to the charterers, but the officers are appointed and the crew engaged and subsisted by the owners, in which case it is held, that the owners, and not the charterers, are responsible to third persons for any damage occasioned by the negligence of the officers and crew. *Fletcher* v. *Braddick*, 5 Bos. & Pul. 182.

Under the circumstances of this case, the Court are of opinion, that the defendant is not responsible for damage arising from the negligence or unskilfulness of the master, officers and crew of the steamboat; that the direction, in this respect, at the trial, was correct, and that there must be judgment on the verdict.

Digitized by Google

JOHN BURNS *et al. versus* RICHARD S. FAY, Administrator, &c.

Where the administrator of an insolvent estate gives notice of his dissatisfaction with the claim awarded by the commissioners to a creditor of the estate, according to the provisions of *St.* 1784, *c.* 2, and the creditor, in consequence, brings his action at law, the creditor is not precluded from recovering a larger sum than was allowed by the commissioners, although he may not have given notice of his intention to have his claim determined at common law.

In such action, the report of the commissioners allowing a set-off against the claim of the plaintiff was *held* not to be competent evidence to prove the set-off.

The books of account of a person deceased, although verified by the oath of a witness, are incompetent to prove cash charges exceeding forty shillings in amount.

Where the administrator of an insolvent estate gives notice of his dissatisfaction with the sum awarded to a creditor, by the commissioners, and the creditor recovers a larger sum than was allowed by the commissioners, the creditor is entitled to an execution for the costs of the action, against the administrator, *de bonis propriis*; but if the administrator had sufficient reason for his appeal, the judge of probate may allow the costs to be charged in the administration account.

It seems, that in all cases, where a creditor recovers at common law, a larger sum than was allowed him by the commissioners of the insolvent estate, judgment for costs should be rendered against the administrator *de bonis propriis*.

ASSUMPSIT against the defendant as administrator of Joseph Hastings, of Cambridge, to recover the value of a quantity of isinglass consigned by the plaintiffs to Hastings for sale Trial before *Morton* J.

Before the commencement of this action, the estate of Hastings was duly represented by the defendant to the judge of probate to be insolvent, and the plaintiffs presented the same claim which is the subject of this action, amounting to $ 3768·55, to the commissioners appointed in pursuance of such representation, for allowance. The defendant, in his capacity of administrator, also presented his account and note in set-off, amounting to $ 498·50, which was allowed by the commissioners. The commissioners allowed, as a balance due to the plaintiffs, $ 1230·74.

The defendant being dissatisfied with the amount awarded to the plaintiffs by the commissioners, gave notice of his dissatisfaction, as required by the statute, and the present action was in consequence commenced by the plaintiffs.

It was agreed that the mutual claims of the plaintiff John Burns and Hastings should be considered, for the purposes

Digitized by Google

of this trial, as existing between the parties in the present action, that being the understanding before the commissioners.

At the trial, it appeared that Hastings had consigned portions of the isinglass to persons at several places for sale; and the defendant offered in evidence the books of Hastings, in which were kept the accounts of sales of the isinglass, with the different consignees, and of payments made by him to them on account of the sales. These books were verified by the oath of one Snow, who was, at the time, a clerk of Hastings. The judge ruled that the books were evidence to show the value of the isinglass, from the sales; but he rejected them as evidence to prove the payments of money by Hastings to the plaintiffs. The charges of payments severally exceeded forty shillings. To this decision the defendant excepted.

Upon an examination of the books, it was discovered that Hastings, in his account with the plaintiff, John Burns, had charged himself with about 154 pounds of isinglass, not included in the account filed by the plaintiffs before the commissioners. The plaintiffs then proposed to offer this in evidence, but it was objected to by the defendant, who contended that they should be confined to the account filed by them before the commissioners. But the judge admitted the evidence, upon the ground that the credits, which the defendant insisted should be allowed in his set-off against the plaintiffs, were not specifically applied, and the plaintiffs might therefore make the application to the payment of the sum due on account of the isinglass so omitted in the plaintiffs' account. To this decision the defendant excepted.

The defendant then offered in evidence a certified copy of the commissioners' report, to prove the account of Hastings, which was filed in set-off and allowed by them, the plaintiffs not having expressed any dissatisfaction with such report, according to the provisions of the statute. The plaintiffs objected to this evidence, and the objection was sustained by the judge. The defendant excepted.

The defendant then contended, that the report of the commissioners was conclusive upon the plaintiffs, they not having expressed their dissatisfaction with the claim as allowed by

Digitized by Google

Burns v. Fay.

the commissioners, and that they were precluded from recovering any greater amount. But with a view to presen the whole matter to the full Court, and by the agreement of the parties, the judge instructed the jury to return a verdict for the plaintiffs, for such sum as, upon all the evidence in the case, they should find to be due, without restriction to the sum allowed by the commissioners.

The jury returned a verdict for the plaintiffs for $ 1539·53.

The defendant moved for a new trial, for the following reasons :

1. Because the judge instructed the jury, that the plaintiffs were not precluded from recovering a verdict for a larger sum than was awarded to them by the commissioners, although the plaintiffs had expressed no dissatisfaction with the report of the commissioners, according to the provisions of the statute.

2. Because the defendant offered in evidence the report of the commissioners upon the claim of the plaintiffs and the set-off filed by the defendant, for the purpose of proving such set-off; which was rejected by the judge, as not proving the set-off, and as not being conclusive upon the plaintiffs.

3. Because the verdict was against the law and the evidence.

4. Because the defendant offered to prove the accounts of sales and payments made by Hastings for the plaintiffs, by the books of account kept by him ; which the judge rejected as inadmissible to prove the credit side of his account.

If the plaintiffs were entitled to recover, the Court were to render judgment for the amount of the verdict, or for such sum as the plaintiffs were entitled to recover ; if, for any of the causes assigned, the defendant ought to have a new trial the verdict was to be set aside and a new trial granted accordingly.

March 14th. *J. Chapman* for the defendant.

S. D. Parker for the plaintiffs.

March 25th WILDE J. delivered the opinion of the Court. Having considered the defendant's exceptions to the decisions of the judge at the trial, we are of opinion, that they are unsupported by any legal principle, and that the plaintiffs are entitled to judgment on the verdict.

Digitized by Google

By the *St.* 1784, *c.* 2, it is provided, "that, in case the executor or administrator [on an insolvent estate] shall be dissatisfied with any creditor's claim allowed by the commissioners, and shall give notice thereof at the probate office, and also to the creditor within twenty days, such claim shall by the judge of probate be struck out of the commissioners' report, unless such creditor shall commence and prosecute at the common law his claim as aforesaid, as speedily as the same can be done" &c.; "and when a claim shall be disputed in the course of the common law as aforesaid, execution shall not issue as in common cases, but the judgment of the Court respecting the same, shall be the amount of the claim, and added to or deducted from the commissioners' report, as the case may require."

We think there can be no doubt as to the true meaning and construction of the statute. When the executor or administrator is dissatisfied with any claim allowed by the commissioners, and gives notice, as the statute requires, of his objection, which it is understood was done by the defendant, the creditor is to commence his action, and have his claim ascertained in the course of the common law, and the judgment of the court respecting the same, shall be the amount of the claim. The report is to remain unaltered in the probate office, until the decision of the suit at law, and then is to be corrected by the judgment on the action. And so it was decided in *Bordman* v. *Smith*, 4 Pick. 214. In other words, the amount of the judgment is to be substituted for the amount allowed by the commissioners. And although the plaintiffs might have been satisfied with the allowance made by the commissioners, yet as the defendant objected and appealed, the plaintiffs had an undoubted right to have their whole claim ascertained, whether it was more or less than the sum allowed by the commissioners.

As to the second exception relied on by the defendant's counsel, we think it very clear that the report of the commissioners was incompetent evidence to prove the defendant's set-off. The action was to be tried according to the course of the common law, and by the common rules of evidence. And the decision of the commissioners, allowing a claim, is

Digitized by Google

Burns v. Fay.

no evidence in an action, the object of which is to correct their judgment, nor is it any proof of the plaintiff's assent to the allowance of the claim; for by the defendant's appeal the plaintiff's whole claim was open to be tried on its original merits.

We think also the defendant's books were not competent to prove cash charges over 40 shillings. This is in conformity with the general rule, to which the case of *Union Bank* v. *Knapp*, 3 Pick. 96, is an exception. This case is not within the exception and the reason upon which that decision rests.

Judgment on the verdict.

A question was made, whether execution for the costs of this suit should issue against the administrator *de bonis propriis*, or against the goods and estate of Hastings, in the hands of the administrator.

WILDE J. As to the question of costs, we are of opinion, that the plaintiffs are entitled to their execution against the defendant, *de bonis propriis*. This case comes within the reason of the rule as laid down in *Hardy* v. *Call*, 16 Mass. R. 530. For, although the administrator is defendant in the action, yet he, by his appeal from the allowance by the commissioners, compelled the plaintiffs to commence their action, or abandon their claim. The case therefore is similar in principle with that of *Hardy* v. *Call*. If, in the exercise of a sound discretion, the administrator had any sufficient reason for his appeal, the judge of probate will undoubtedly allow the costs to be charged in his account of administration. But if the appeal was groundless and the administrator shall fail to show that he had apparently some reason to be dissatisfied with the allowance made by the commissioners, the costs certainly ought not to be a charge on the goods and estate of the intestate. We are also inclined to the opinion, that in all cases of recovery by a creditor, under the insolvent law, judgment for costs ought to be against the administrator, *de bonis propriis*; as the amount of the creditor's *claim* only is to be added to or deducted from the commissioners' report,

Digitized by Google

and no provision is made as to costs. But as to this, it is unnecessary in the present case to decide, as we are satisfied that such must be the form of judgment in this case, whatever may be the construction of the statute.

HORACE SCUDDER *et al. versus* JOHN BRADFORD.

Where the master of a vessel which was dragging her anchors towards the shore, cut away the masts to prevent her drifting and thereupon she brought up, but after about an hour she drifted again and was wrecked, it was *held* that the cargo which was saved, was not liable in general average, inasmuch as the sacrifice of the masts did not rescue it from the particular peril then impending.

ASSUMPSIT to recover a sum of money as general average.

At the trial before *Shaw* C. J. it appeared, that the plaintiffs were the owners of the schooner Champion, which sailed from New York for Boston about the 22d of January, 1831, with a cargo.

The master deposed, among other things, that on the 31st of January, at about 10 o'clock in the evening, he passed Cape Cod light; that at 11 o'clock commenced a severe snow storm, with a gale of wind from east-north-east; that at about 8 o'clock the next morning, he was among Cohasset rocks, and was standing to the westward; that finding he could not get past them, as the wind was too light, he wore ship to the southward and let go both anchors; that the schooner kept drifting, and he cut away her masts to prevent her drifting, and she then brought up; that in about an hour afterwards she drifted again, and continued to drift until she struck on the rocks, and he then slipped both cables and let her go as high as she would, for the preservation of the lives of those on board, and of the cargo. He abandoned her in the afternoon, and the next day he found her dry on the rocks, with her bottom stove to pieces.

It was admitted that the defendant had goods on board the schooner, which were ultimately saved.

A nonsuit was entered. If upon the facts stated in the master's deposition and such as a jury ought to infer from it,

Digitized by Google

Scudder v. Bradford.

the Court should be of opinion that the plaintiff was entitled to recover, the nonsuit was to be taken off; but otherwise judgment was to be rendered thereon for the defendant.

March 16th. For the plaintiff were cited *Potter* v. *Providence &c. Ins. Co.*, 4 Mason, 299; *Caze* v. *Reilly*, 3 Wash. C. C. R. 298.

Peabody and *Watts*, for the defendant, cited Phillips on Ins. 342; Hughes on Ins. 294; 3 Kent's Com. 187; Stevens on Av. 9, 17; *Whitteridge* v. *Norris*, 6 Mass. R. 131; *Bradhurst* v. *Columbian Ins. Co.*, 9 Johns. R. 9.

April 1st. PUTNAM J. delivered the opinion of the Court. The general rule, that where the property of one is sacrificed for the preservation of that of others, in the prosecution of a voyage, is familiar, but of somewhat difficult application. It must be proved that the sacrifice was necessary and voluntary; it must be intended for the safety of all concerned, and it must appear that thereby the property which is to contribute, was rescued from the imminent peril then impending. The property saved from the danger which was immediately threatening, shall be held to contribute, notwithstanding it may be lost by subsequent perils in the course of the voyage.

No vessel could be in greater distress and danger than the Champion was in, when the masts were cut away. It was the voluntary act of the master. It was the only thing which could be done, to prevent shipwreck. It was done to save the cargo and ship, and the lives of those who were on board. There was a heavy swell of the sea, which was driving the ship with great violence towards the rocks. The wind was very light, and that also blowing towards the shore. In such circumstances it would have been hazardous if not impossible to bring her on the stays; so that tacking was out of the question. They tried in vain by wearing ship to keep her off. They threw over their anchors, but they were dragged by the force of the sea. The only hope was, that by the cutting away the masts the anchors might bring up the ship and prevent her drifting towards the shore. If that measure had succeeded, this would have been a case for a contribution; but it did not succeed. In about one hour after the masts were cut away, the ship drifted and dragged her anchors until she reached and was wrecked upon the rocky shore

Digitized by Google

It cannot be affirmed that the property which was saved from the wreck was saved by the means of the cutting away of the masts The forlorn hope failed. There was no more benefit derived from cutting away the masts before she reached the shore, than from the slipping of the cables afterwards. It cannot be said that the property was safe or saved during the short space of time that she was brought up. The sea continued to set and roll with violence towards the shore, until the anchors were dragged as before. It was one continued peril, which was not avoided by the voluntary destruction of the masts. Phillips on Ins. 342. If the anchors had brought up the ship after the masts had been cut away and had held her until the then impending peril had ceased, and the ship had proceeded upon her voyage and been lost afterwards, from other perils, the contribution would be due. For this general average is to be paid once or oftener, although the ship should be finally lost on the same voyage by subsequent and distinct perils. Weskett, 31, *tit. Average*, § 16. To apply this rule. Suppose the claim should have been made within the hour that the anchors held the ship after the masts were cut away. The answer would be obvious. Wait, and see if the ship will ride out this perilous swell of the sea; if she does, then call for your average. If she does not, this well intended damage to the ship must go for nothing, as no benefit or safety will be derived from it. The answer is certainly as good now as it would have been then. The sacrifice was of no avail, and cannot be the legal foundation of a claim for contribution. What was saved was saved *tanquam ex incendio*. Phillips on Ins. 342.

It is the opinion of the whole Court that the judgment must be for the defendant.

Digitized by Google

ZABDIEL B. ADAMS *et al.* *versus* EDWARD CRUFT *et al.*

A testator, after giving to his wife his mansion-house and the income of certain personal estate for her life, directed that, at her decease, the same should "be divided among his children, share and share alike, and to the heirs of their bodies respectively;" and that, if such income should not amount to $ 1000 annually, the deficiency should be made up from the personal estate. To his sisters and nephew he bequeathed small annuities, and to his sons the sum of $ 10,000 each. He also gave $ 10,000 to trustees, the income of which was to be paid over to his daughter C. during her life, "and at her decease the whole principal and interest to be divided equally among the heirs of her body, if any; and in default thereof, the same to go to her surviving brothers and sister in equal shares, and to their heirs forever;" and in case she should be married before the youngest child of the testator arrived at full age, the executor was authorized to advance to her a sum not exceeding $ 2000, taking therefor her receipt on interest, the same to be deducted from her share in the division of the estate. The residuary clause of the will was as follows: "My will is, that as soon as my youngest child shall have arrived at full age, all the rest and residue of my estate, real and personal or mixed, after providing for the annuities to my two sisters and nephew, except such as is bequeathed to my said wife during her life, shall be divided into equal parts; one of which to go to each of my *said children, who shall be then living, and to the heirs of their bodies respectively forever, and to none other.*" It was *held*, that the words "heirs of their bodies," in the residuary clause, were to be construed as words of limitation and not as words of purchase; that as they would have created an estate tail in real estate, the children were entitled to the residuary fund, which consisted of personal estate only, as their absolute property; and that, as no directions were given as to the investment or management of the residuary fund, and no designation of usufruct expressed, as distinct from an absolute gift to the children, the fund itself should be distributed among them, when the youngest child arrived at full age, subject to the charges for securing the income of the widow and the annuities.

THIS was a bill in equity brought by Zabdiel B. Adams and Sarah M., his wife, George W. Holland, David R Griggs and Aaron D. Weld junior, Edgar K. Whittaker and Catharine C., his wife, Isaac Mansfield, Frederick W., Sarah and Elizabeth Holland and Ann West, against Edward Cruft, administrator with the will annexed, of John Holland, and against others, the grandchildren of John Holland.

The bill alleges, that on August 23, 1822, John Holland made his will, in which were the following clauses:

"I give to my wife, Sarah, during her natural life, all my mansion-house and appurtenances, with the furniture and stores as the same shall remain at my decease, and my pew in Federal street meetinghouse; also the income and profits of my

Digitized by Google

right in the Boston Pier or Long Wharf, being one full share of the same, that is, three warehouses and one twenty-fourth part of said wharf; and at her decease, the said mansion house, with the remainder of the furniture and stores, if any, the pew and also said right, to be divided among my children, Samuel M , Sarah M., George W., Catharine C. and Frederick W., share and share alike, and to the heirs of their bodies respectively; and if the net annual income of my said right in the same Boston Pier shall, in any one year during the life of my said wife, fall short of the sum of $ 1000, my will is that such deficiency be paid to her by my executor, from my personal estate; it being my intention, that the annual provision for her support shall in no event be less than $ 1000, besides the occupation or rent of my said mansion-house, if she shall prefer to let the same."

"I give to my sister Elizabeth Holland, to my sister Ann West and to my nephew Thomas Holland, to such of them as shall survive me and to each of them, $ 60 per annum, payable half yearly, from the day of my decease during their lives respectively."

"My will is, that so soon as my youngest child shall have arrived at full age, all the rest and residue of my estate, real and personal or mixed, after providing for the annuities to my two sisters and nephew, except such as is bequeathed to my said wife during her life, shall be divided into equal parts; one of which to go to each of my said children who shall be then living, and to the heirs of their bodies respectively for ever, and to none other."

The bill further alleges, that the testator died on June 18, 1824; that E. Cruft was appointed administrator with the will annexed; that Thomas Holland has long since deceased; that Frederick W. Holland, who was the youngest child of the testator, arrived at full age, on June 22, 1832; that Samuel M. Holland, now deceased, for a valuable considera tion, assigned all his right and interest in and under the devises aforesaid to George W. Holland; that George W. has assigned all the interest so devised to him to Griggs and Weld, by way of collateral security; that upon a treaty of marriage between Edgar K. Whittaker and Catharine C.

Digitized by Google

Adams v. Cruft.

Holland, all her interest under said devises was conveyed in trust, and that Mansfield is now the trustee; that Samuel M., at his death, left three children; that Zabdiel B. Adams and his wife had four children; that George W. has two children; and that Edgar K. Whittaker and his wife have one child; that all these children (who are respondents) are minors; that the respondent Cruft, under the devise first set out, and under the bequest of annuities, and the charge thereby made on the estate of the testator and the trust thence arising, ought to have set apart a sufficient sum for the satisfying thereof, and ought to have declared the trusts for which the same was set apart, but that he had declined to set apart any portion of the property for that purpose; for that after satisfying the specific and other devises and legacies, providing a fund for the maintenance of the widow and for paying the annuities, he would have had, at the time when Frederick W. arrived at full age, and now has in his hands, as administrator, a large sum of money, being the residue of the estate, which ought to have been divided, in equal shares, among such of the complainants as were the children of the testator, or their representatives, as an absolute estate; but that he had refused so to do. Wherefore the complainants pray an account &c., and that execution of the trust may be decreed.

The answer of Cruft alleges, that the annuities bequeathed are made a charge upon the whole residuary fund claimed, not upon any particular portion thereof; that if the testator had intended that the residuary fund should be divided, as now claimed by the bill, he, the testator, would have set apart a fund to be charged with the annuities; that the whole of the residuary fund claimed is pledged, in the hands of the respondent, for the purpose of making up any deficiency in the income provided for the widow. It denies, that it is the duty of the respondent to set apart a fund to be charged with the annuities &c., at the respondent's own risk, without the assent of the annuitants &c.; and admits that a large amount of personal, but no real estate, has come into his hands, which he is desirous to pay over to the person who may be entitled thereto, but denies that the complainants are

Digitized by Google

entitled to their shares, as they claim the right to receive them, as an absolute estate.

The other respondents answered by their guardian *ad litem*, Francis O. Watts Esq., denying that Samuel M. could legally assign &c., or that the residue of the estate ought to have been divided when Frederick W. came of age, among the complainants in equal shares, as claimed in the bill, other than the annual profits, or that a fund should be set apart for the annuitants &c.; and alleging, that they believe that it was the intention of the testator, that the property should be secured for the benefit of the grandchildren as well as children.

To these answers the complainants filed a general replication.

There was another clause in the will, by which the testator gave the sum of $ 7,800 to trustees, to be invested in stocks or real estate, and the interest and dividends to be paid over to his daughter Sarah M. during her life; at her decease, the principal and interest were to be divided equally among the heirs of her body, if any; and in default thereof, the same were to go to her surviving brothers and sister, in equal shares, and to their respective heirs forever.

The testator also gave the sum of $ 10,000 to the same trustees, in trust for his daughter Catharine C., with similar provisions; and in case she should be married before Frederick W. should arrive at full age, the executor was authorized to advance to her, as an outfit, a sum not exceeding $ 2000, taking therefor her receipt on interest, the same to be deducted from her share in the division of the estate.

By other clauses in the will, the testator gave $ 10,000 to each of his sons.

Fletcher for the complainants. The intent of the testator, in the residuary clause of the will, is too plain to require the aid of any technical rules in its construction. The residue is all personal estate; and the testator says that it shall go to each of his children, who shall be living at a certain time, and to the heirs of their bodies. Even if the children were to take only a life estate in such residue, still, as no trustee is appointed, they would be entitled to have their shares deliv-

Digitized by Google

Adams v. Crust.

ered over to them. *Weeks* v. *Weeks*, 5 N. Hamp. R. 326 If the residue had been real estate, this clause would have created an estate tail; and it will perhaps be contended, that it has a similar effect upon personal estate; but it is well settled, that words which would create an estate tail when applied to real estate, give an absolute property to the first taker, when applied to personal.

It may be argued, that though personal estate cannot be entailed, yet you may give a life estate in it, with remainder over, as an executory bequest; this is true, but then there must be words expressly giving a life estate, and the words of the remainder over must be words of purchase and not of limitation; both these requisites are wanting in this residuary clause. In order however to carry into effect the intention of the testator, the words "heirs of their bodies," if applied to the children of the living children of the testator, will be deemed words of limitation; but they will be applied to the children of a child who dies before the time appointed for the division of the residue, as words of purchase; otherwise no provision is made in the will for the children of such deceased child.

It appears that the testator understood how to give a life estate; and if he had intended to give such an estate in the residue to his children, he would have provided, that they should enjoy the income only during their lives, and would have appointed a trustee. *Weeks* v. *Weeks*, 5 N. H. R. 326.

The provision in the bequest to his daughter, Catharine C., that a sum not exceeding $ 2000 should, in a certain event, be advanced to her and be deducted from her share on the division of the estate, shows that it was his intent that the children should take absolutely; for otherwise, it could not be so deducted.

If the residue had been real estate, the entail could have been broken, the moment that it came into the possession of the children; and personal estate cannot be more strictly limited than real estate.

If it should be held, that the children and grandchildren of the testator took as tenants in common, then it could not

Digitized by Google

be known what share each would be entitled to, until there was an end of the increase of the grandchildren.

Cooke, *W. J. Hubbard* and *Watts* for the respondents. 1. The children of the testator, living at the time of the arrival of Frederick W. at full age, take the residue as tenants in common with the grandchildren. *Annable* v. *Patch*, 3 Pick. 360; Gilb. Uses, 25; *Wild's case*, 6 Co. 17; *Doe* v *Laming*, 2 Burr. 1100; *Bowers* v. *Porter*, 4 Pick. 198; *Ellis* v. *Proprietors of Merrimack Bridge*, 2 Pick. 243; *Durdant* v. *Burchet*, Skinner, 205; *Wills* v. *Palmer*, 5 Burr. 2615.

2. It was the intention of the testator to give only a life estate to his children, and an executory bequest to his grandchildren.

It is clear from an examination of other clauses in the will, that the words "heirs of their bodies" were used in a popular sense, as synonymous with "children," which is a word of purchase; and if so, an interest in the property was secured to the grandchildren, as purchasers, as absolutely as to the children. But suppose that they were used in a technical sense, then the *St.* 1791, *c.* 60, § 3, will apply. It is not essential, in order to produce this effect, that the life estate should be given in so many words, but it is sufficient if it be given by necessary implication, as in the present case. *Bowers* v. *Porter*, 4 Pick. 198.

It is said, that where personal estate is given by words that would create an estate tail if applied to real estate, it becomes the absolute property of the first taker; but this rule will not be applied where, as in the present case, it would defeat the intention of the testator. Besides, this is a will of real, as well as personal estate; and it is to be presumed that the testator used the words in the same sense throughout.

The circumstance that no trustee was appointed by the testator, is of no consequence; for the executor may act as trustee. *Claggett* v. *Hardy*, 3 N. Hampsh. R. 147; *Saunderson* v. *Stearns*, 6 Mass. R. 37.

As to the argument drawn from the provision in the bequest to Catharine C., the deduction was, in effect, to be made from the sum of $ 10,000 bequeathed in trust for her

Digitized by Google

Adams v. Cruft. April 1st.

SHAW C. J. delivered the opinion of the Court. The principal question to which the attention of the Court has been called in this case by the course of the argument, arises upon the construction of the residuary clause, in John Holland's will; and the question is, who are to take, and what estates respectively, by the terms of that clause in the will.

It may be remarked in the outset, that although the will embraces both real and personal estate, yet it appears by the facts in the case that there is no real estate, upon which this residuary clause can operate, and that the question actually before us, is only as to the effect of this clause upon personal property.

It is contended on the part of the grandchildren, that the words "heirs of their bodies," used in this clause, are not to be taken as words of limitation, qualifying the estate of inheritance given to the sons and daughters, but are here used synonymously with the word "children," and so to be considered as *descriptio personarum*, designating the grandchildren, who are to take portions of this estate as purchasers.

That words, which in their natural and ordinary signification are words of limitation, may be construed to be words of purchase, there is no doubt; but this will take place only where it is the clear and manifest *intent* of the testator, to be ascertained by the qualifying words used in immediate connection with the particular terms, or to be derived from other parts of the same will. The general rule is, that the intent, as expressed by the will, shall govern; and to give effect to this rule, the language of the will shall have its natural and technical construction, unless it is obvious that the testator used it in a different sense. And in the latter case, there are scarcely any words, however strong and explicit in themselves, which may not be controlled and limited by such different intent, expressed by the will itself.

So it has been held, that a devise to one and the heirs of her body, under particular circumstances shall be held to make the heirs take by purchase. But the circumstances were very peculiar, and the intent of the testator manifest. *Doe* v. *Laming*, 2 Burr. 1100.

So it has been held by the highest authority, that a devise

Digitized by Google

to the "*heir*" of one, known to the testator at the time to be living, notwithstanding the well-known maxim, *nemo est hæres viventis*, shall be construed to be "heir apparent," and a description of the person, so that the person thus designated shall take by purchase. This however was so held upon clear proof, from other parts of the will, that the testator knew, that the ancestor of the person named as heir, was living and so could not have used the word in its technical sense, and also of an intent that the person designated should take. *Darbison* v. *Beaumont*, 1 P. Wms. 229.

But the Court are all of opinion, that the words, "heirs of their bodies," as annexed to the word children in this will, are to be construed as words of limitation and not as words of purchase, because these words, in their ordinary legal import, are words of limitation and not of purchase, and because there is nothing in this will showing an intent on the part of the testator to use them in a different sense, and nothing to show an intent, either in their connection with other words in the sentence in which they were used, or in any words or provisions of the will, that his grandchildren should take originally and in their own right equally with his children, which would be the effect of treating them as purchasers. On the contrary, we think, that by a comparison of different parts of the will with each other, a different intent will be apparent.

This case is extremely distinguishable from that of *Annable* v. *Patch*, 3 Pick. 360, cited in the argument. There the words used were "to my daughter and the children born of her body." The Court held, that this was a description of persons, who with the mother should take as purchasers. That cause was decided principally upon the authority of *Buffar* v. *Bradford*, 2 Atk. 220, in which it was said by the chancellor, that the word "children," in its natural import was a word of purchase; but the use of the word "heirs" would have had a very different construction.

When it is said the intent of the testator is to be a governing rule in the construction of wills, it must be understood to be such an intent as can be carried into effect, according to established rules of law. To apply this remark to this will; the testator declares that this residue is to go to his

Digitized by Google

Adams v. Cruft

children and the heirs of their bodies respectively forever *and to none other*. Now if it was the intention of the testator, to create a perpetuity in his family and to keep this property in the houses of his lineal descendants, and make it inalienable, it is very clear that such an intent being in violation of the rules of law, cannot be carried into effect. And in the present case, the last words, "and to none other," seem to be wholly inoperative and void. The strict question of intent rather seems to be, whom or what persons did the testator intend to make the objects of his bounty, and what quality or species of estate, did he intend to create and vest in them respectively. This being ascertained, in the manner already stated, by the particular language used, qualified and limited by every other part and clause of the will, the law annexes to the estate thus created, the incidents and the character which belong to it. And it will not be presumed that the testator had a different intent from that which the words naturally import, so as to change the construction of the will, in creating a particular estate, although that estate will be attended by some consequences, which the testator did not anticipate. For instance, if a testator not knowing that an estate tail might be barred by a common recovery, and in our own State by a simple deed, so as to defeat the heirs in tail, should insert a devise in his will, which by law would operate to create an estate tail, accompanied by expressions, showing his expectation that it was to continue inalienable till his issue were extinct, it would afford no reason for putting a forced construction on the will, and holding it not an estate tail, because his intent to benefit his heirs in tail, in perpetuity, might otherwise be defeated.

Nor is it to be presumed, without satisfactory proof from other parts of the will, that when a testator uses language, which is often used on like occasions, which has been the subject of frequent judicial discussion and exposition and is well understood, he intends to use it in a sense different from that in which it has usually been understood and applied. The clause in question, contains precise, apt and technical language to create an estate tail, and there is nothing in any part of the will, to show that such was not his intent, unless

Digitized by Google

it be the words already cited, showing an intent, that the property should continue inalienable in the line of his own family, till extinct; and this manifests rather an intent to give a certain effect to an estate tail, which the law will not warrant, than an intent not to create an estate tail in his children.

Another construction put upon the will in question and contended for in behalf of the grandchildren is, that it gives the residue to the children for their lives, and afterwards to their children, and so by force of the statute of this commonwealth, *St.* 1791, *c.* 61, § 3, controlling and in effect repealing the rule in *Shelley's case*, here was but a life estate to the children as first takers, with a remainder in fee to their children. We think it quite impossible to maintain this position; there are no words, and certainly there is no intimation in this residuary clause, that the property is given to the children for their lives. It is not contended that this is a gift for life expressly, but it is contended that it is so by necessary implication. This brings the case back to the question already discussed, whether the words "heirs of their bodies" as here used, are words of limitation or words of purchase; because all the considerations which go to show that these are used as words of limitation, and do not constitute a *descriptio personarum*, conclude as strongly against their claiming in the character of remainder-men, as against their claiming in the character of tenants in common, with their parents.

The term "heirs of the body," is a designation strictly technical, and they are words of limitation not confined to children, but include lineal descendants indefinitely. They are then words of inheritance, limiting the descent to a particular class of heirs. Such a limitation constitutes an estate tail in real estate; and by a well settled rule of law, words which create an estate tail in real estate, will give an absolute interest in personal property.

The construction adopted derives support from other clauses and provisions in the will. The argument is, that by the words "heirs of the body," the testator must necessarily have intended children. In one clause he gives real and personal property to his wife for life, with remainder to his five chil-

Digitized by Google

Adams v. Cruft.

dren, naming them, share and share alike, "and to the heirs of their bodies respectively." This remainder is beyond question an estate tail to the five children as tenants in common in the real estate. In the trust for his daughters, the property is given in trust for each daughter during her life, and at her decease to be divided equally among the heirs of her body, if any, and in default thereof, to her brothers and sister in equal shares and to their respective heirs. Now here I do not understand, that the testator, by "heirs of her body," meant children to the exclusion of issue in a remoter degree; but if there were grandchildren, it was his intention that they should take the property, in preference to the collateral relations, to whom it was limited. The testator may have been mistaken in point of law in supposing that an estate tail might be limited in personal property; but these provisions manifestly show, that when the testator used these words, he used them in their natural and proper sense, as equivalent to issue, or lineal descendants indefinitely; and if they were so used in the clause in question, then it has been already shown that they create an estate tail in the real estate and an absolute gift in the personal property.

Another question considered was, whether, since the youngest of the legatees has come of age, the capital is now to be divided, subject to the charges for securing the annuities to the widow and legatees. That the capital or principal sum was to go to the children, subject to those charges, and not to be put at interest or retained by the executor as trustee, is manifest, we think, from several clauses in the will.

It is to be observed, that there is no intention manifested on the part of the testator, that the income or profits or improvements of the property should go to the legatees, or any designation of usufruct expressed, as distinct from an absolute and direct gift to them. There are no directions given to invest the amount or place the same at interest, and it would be highly probable that some directions would have been given as to the management of this fund, had it been understood by the testator that it was to remain in the hands of the executor or other trustees, during the lives of all the children respectively.

Digitized by Google

The advance to be made to the daughter out of the general funds by the executor, in case of her marriage, in anticipation of a division and distribution, shows that the fund itself was to be divided; and the charge of interest on such advance, shows that it was to be divided within some reasonably limited time. But if not to be made, when the youngest of the children should come of age, there was no time fixed; and if a distribution was not to be made at that time, it is difficult to perceive any good reason, why that time was fixed at all, by the will.

The Court accordingly decreed, that by the will of John Holland, an absolute estate and property in the residuum of the personalty was vested in the children of the testator, and was distributable among them and their legal representatives, when Frederick W. Holland arrived at full age; that the annuitants and other complainants were entitled to have a fund set apart out of the personalty, to provide for the payment of the annuities or for the purchase of annuities of equal amount, at the option of the annuitants; and that the widow and other complainants were entitled to have an adequate sum set apart to provide for any insufficiency of the income of the testator's right in Long Wharf, to make up the annuity bequeathed to her.

Digitized by Google

JOHN A. HAVEN *versus* PRINCE SNOW.

Where an officer, immediately upon receiving a writ with directions to attach certain real estate of the debtor, made a memorandum upon the writ that he attached accordingly, stating the day and month, but afterwards by mistake returned that he attached on the same day of the succeeding month, and in the Court of Common Pleas, at the return term, upon leave to amend he corrected the error, it was *held* that the amendment was properly allowed, the memorandum being something to amend by.

It was also *held*, that the amendment was effective as against another creditor who attached the same real estate between the days mentioned in the memorandum and in the return, such creditor having constructive notice of the first attachment.

The same attorney having commenced both actions and directed the order of the attachments, notice to him of the first attachment was *held* to be notice to the subsequently attaching creditor.

THIS was an action on the case against a deputy sheriff for neglecting to serve a writ in favor of the plaintiff against George Baxter by the attachment of his real estate, pursuant to the plaintiff's directions, by which neglect the plaintiff alleged he had lost the debt due to him from Baxter.

At the trial, before *Morton* J., the plaintiff proved, that on the 19th of November, 1830, he caused a writ in his favor against Baxter, founded on a promissory note for 639 dollars, to be delivered to the defendant, with directions to attach certain real estate of Baxter, in Boston, and made a memorandum to that effect on the writ, and furnished the defendant with a memorandum of the lands, which are the same described in the defendant's return on the writ. The defendant received the writ and undertook to serve it according to the directions. But the next day, November 20th, the defendant attached the same lands on a writ in favor of one Austin. They had been previously attached by another deputy sheriff, on the 18th of November, on a suit in favor of one Strong against Baxter. They were again attached by another deputy sheriff on the 22d of November, on a writ in favor of Messrs. Carnes against Baxter. On the 24th of November they were mortgaged by Baxter to one Cooke.

The plaintiff then put into the case the original writ in his favor against Baxter, and the defendant's return thereon

Digitized by Google

made to the January term of the Common Pleas, by which it appeared that the defendant, on the 19th of December, 1830, at twenty minutes past 12 o'clock P. M., had attached the lands before mentioned.

The plaintiff further proved, that at the January term of the Common Pleas, 1832, judgments were recovered in the suits of Strong, Austin and Messrs. Carnes for the amount of the debts, and also in the suit of the plaintiff for $777·30, and that executions on these judgments were levied in due time in the following order, viz. Strong's, the plaintiff's, Austin's and Messrs. Carnes's. The plaintiff's execution was levied on land in Belknap street and returned satisfied. The same land was afterwards levied on by virtue of Messrs. Carnes's execution, and seisin thereof delivered to them by another deputy sheriff. Baxter's lands were not sufficient to satisfy all the executions, that of Messrs. Carnes being returned satisfied in part only.

By the return on the plaintiff's execution the defendant delivered seisin of the land levied on "subject to any prior attachment if any there be thereon"

It further appeared that the plaintiff's attorney, when he handed the writ to the defendant, saw him make a memorandum, but what the memorandum was he did not know. The plaintiff's attorney was also the attorney of Strong, Austin and Messrs. Carnes, and he delivered their writs to the several deputy sheriffs with directions as to the attachments, and he directed the levies of their executions as he thought most beneficial to them, having regard to the priority of attachments.

At the January term of the Common Pleas, 1830, the plaintiff's attorney filed for the defendant a petition for leave to amend his return on the plaintiff's writ by inserting the 19th of November instead of the 19th of December; which was granted and the amendment made accordingly.

The 19th of December was Sunday. The return on the plaintiff's writ states that the defendant gave a summons to Baxter on the 8th of December.

On the original writ, which was produced by the plaintiff, appeared the following memorandum in the handwriting of

Digitized by Google

Haven v. Snow

the defendant: — "Attached as above directed 20 minutes past 12 P. M. Nov. 19th. — Attachment No. 1, by P. S. Dep. Shff."

The defendant's return on the writ of Austin set forth, that the attachment by virtue thereof was the second one made by the defendant on the lands above mentioned, and that the prior attachment was in favor of the plaintiff.

The levy of the plaintiff's execution has been no otherwise disturbed than by the subsequent levy of Messrs. Carnes's execution; since which the plaintiff has not entered or been in possession, nor in any way intermeddled with the rents and profits.

The defendant offered his private book or record of his doings in relation to writs and processes, as evidence of his doings in relation to the plaintiff's writ and the time of the attachment, but the same was rejected by the said judge

The Court were to render such judgment for the plaintiff or defendant as the rules of law should require.

March 25th. *Bartlett* for the plaintiff. If there were no amendment, the defendant could not aver or prove, against his return, that he made the attachment on the 19th of November. *Gardner* v. *Hosmer*, 6 Mass. R. 325; *Weld* v. *Bartlett*, 10 Mass. R. 475. Nor in an action against him for a fault in his return, whereby the plaintiff has lost his property, can he be allowed to amend. *Emerson* v. *Upton*, 9 Pick. 167; *Williams* v. *Brackett*, 8 Mass. R. 240; *Means* v. *Osgood*, 7 Greenl. 147. The plaintiff contends that he has lost his property in consequence of the levy of the execution of Messrs. Carnes; who are a third party and cannot be affected by an amendment. But if their title is questioned, on the ground that the case of *Emerson* v. *Upton* is applicable only to innocent purchasers, and that Messrs. Carnes had notice, the plaintiff's attorney being likewise their attorney, still we say that Cooke had no notice and the mortgage to him equally deprives the plaintiff of the land.

Fletcher, for the defendant, cited as to amendments, *Emerson* v. *Upton*, 9 Pick. 170; *Mestaer* v. *Hertz*, 3 Maule & Selw. 450; *Hunt* v. *Pasman*, 4 Maule & Selw. 329; *Thatcher* v. *Miller*, 11 Mass. R. 413, and 13 Mass. R. 270; *Pret*

Digitized by Google

cott v. *Tufts*, 4 Mass. R. 146 ; *Freeman* v. *Paul*, 3 Greenl. 260 ; *Means* v. *Osgood*, 7 Greenl. 148 ; *Adams* v. *Robinson*, 1 Pick 462.

April 1st.

WILDE J. delivered the opinion of the Court. The defendant is charged with the neglect or breach of his official duty, he being a deputy sheriff, in not duly serving a certain writ in favor of the plaintiff, by the means of which he has lost his debt. The writ was handed to the defendant by the plaintiff's attorney on the 19th day of November, 1830, with directions to serve it by laying an attachment on the debtor's real estate. But it appears by the defendant's return, that the attachment was not made until the 19th day of December following, and that in the mean time, viz. on the 22d day of November, the same estate attached on the plaintiff's writ was attached on a writ in favor of Messrs. Carnes against the same debtor, and that they afterwards levied their execution on the whole of the lands levied on by the plaintiff. It appears, however, if it is competent for the defendant to show the fact, that the attachment on the plaintiff's writ was in truth made on the 19th of November, instead of the 19th of December, and that the return was amended accordingly.

The question is, whether the defendant is liable for the mistake made in his return, or in other words, whether the Messrs. Carnes had a right to hold the lands attached and levied on against the plaintiff.

The plaintiff's counsel rely on the case of *Emerson* v. *Upton*, 9 Pick. 167, which in many respects bears a close resemblance to the case at bar. But these cases differ in two important particulars.

In the first place, in the case of *Emerson* v. *Upton* there was no written minute, or any other document, to amend by, and this is noticed by the late chief justice as a material circumstance to show the danger of allowing an amendment to operate in that case. He observes "that the officer should at least make a minute of his doings at the very moment when the act is to have its legal operation, and not, after months have elapsed, be permitted to retrace his steps, and change the whole effect of his proceedings, as apparent by his official

Digitized by Google

Haven v. Snow

return." The same difficulty prevented the allowance of an amendment of the officer's return in *Thatcher et al.* v. *Miller*, 13 Mass. R. 270. "In the cases cited," it is said, "where amendments have been permitted, there was something on the record, by which the correction could be made; and in such cases there can be no difficulty." The same point is noticed in *Means* v. *Osgood*, 7 Greenl. 146.

In the present case there is a memorandum of the time of the attachment, in the handwriting of the defendant, and signed with the initials of his name, made at the very moment of the attachment, and in presence, undoubtedly, of the plaintiff's attorney, so that there can be no possible doubt of the verity of the amended return.

It has been argued that the amendment makes no substantial difference; that the memorandum of the attachment, appearing on the writ, may be considered as a part of the return; and that it sufficiently appeared before the amendment, at what time the attachment was made. Without deciding this point, it is sufficient to say that the memorandum fully justifies the amendment, and that this case is to be decided by the facts appearing by the amended return.

2. The other circumstance by which this case is distinguished from that of *Emerson* v. *Upton* is perhaps not less important. The demandant in that case had no notice of the attachment set up against him before he recorded his mortgage deed. In the present case the Messrs. Carnes had constructive notice of the plaintiff's attachment before suing out their writ. The plaintiff's attorney was also employed by them, and he had sufficient notice of the plaintiff's attachment. He directed the order of the attachments, and he could have no reason to doubt that the plaintiff's attachment had been made as directed. Now it is a well established principle, that notice to an agent or attorney is presumptive notice to the party himself. 2 Fonbl. 153. As where all the securities were transmitted by the same scrivener, notice to him is notice to all the parties. *Brotherton* v. *Hatt*, 2 Vern. 574. So if A purchases in the name of B, with knowledge of a prior incumbrance, and B pays the purchase money, without notice of the incumbrance, yet he shall

Digitized by Google

be affected with the notice to A, because B, by approving of A's conduct, made him his agent *ab initio*. *Jennings* v. *Moore et al.*, 2 Vern. 609. This case is doubted by Lord *Hardwicke* in the case of *Le Neve* v. *Le Neve*, 3 Atk. 649, but he fully admits the general principle. There may be cases where a party would not be bound by the knowledge of facts possessed by an agent or attorney, as where such facts had come to his knowledge a long time before he was engaged to act as agent or attorney, or under circumstances which would warrant a presumption that he had forgot the facts. But in the present case the attorney of Messrs. Carnes was the attorney of all the attaching creditors; he acted with full knowledge of all the facts; and directed the order of the attachments. If he had attempted to give an undue preference to one of the creditors, or to take advantage of a slip by the officer, it would have been a fraudulent attempt, of which the party would not be permitted to avail himself. Under these circumstances notice to the attorney is sufficient, and equivalent to notice to the party himself. It is true there was in fact in this case no intention on the part of the attorney, at the time of ordering the attachment in favor of Messrs. Carnes, to take any undue advantage of the officer's mistake, for it had not then happened; but it is equally against good faith for the party to take any such advantage now. We think therefore the Messrs. Carnes have no right to object to the amendment of the officer's return, as they will not thereby be deprived of any benefit intended to be secured to them at the time of the attachment.

The cases cited as to amendments of writs have but a slight bearing; but there is a remark made in *Emerson* v. *Upton* which may require some explanation. It is there said, that "it will be found on examination of the cases in which amendments of writs have been granted, that the effect of them, when any change has been made, has been limited to the parties to the suit in which the amendment is granted." It must not be inferred from this remark that all amendments are to be thus limited, for it is clear, we think, that amendments in form merely will not dissolve an attachment so as to let in subsequently attaching creditors, or discharge bail.

Digitized by Google

Haven v. Snow.

To have this effect the amendment must be such as may let in some new demand, or new cause of action.

In respect to Cooke's mortgage it is clear that his claim cannot affect the present action, for he cannot hold against the attachment and levy of Messrs. Carnes, and it is to him immaterial whether their title or the plaintiff's eventually prevails.

Plaintiff nonsuit.

Frederick Tudor *versus* Ichabod Macomber *et al.*

In adjusting a general average in the case of a jettison, if the vessel arrives at the port of destination, the value of the goods thrown overboard is the net price for which they might have been sold at that port.

But if the vessel returns to the port of departure or a neighbouring port, the actual price of replacing the goods thrown overboard, or if that cannot be done, the cost price, including shipping charges, is the rule by which the value of the goods jettisoned should be ascertained.

As a general rule, the valuation of the cargo in the bill of lading is conclusive between the owner of the ship and the owner of the cargo, in the adjustment of a general average at the home port.

Where the cargo jettisoned consisted of ice, which had no market value at the port of departure, but in the bill of lading (there being no invoice) was valued at a certain sum, and the vessel returned to her port of departure, it was *held*, that in adjusting the general average at that port the sum in the bill of lading was to be taken to be the value as between the shipper and the ship-owner; and that as no freight was earned, the contribution was to be made by the ship and cargo alone.

Assumpsit to recover contribution of the defendants, the owners of the schooner Wave, as a general average for the loss of a cargo of ice shipped on board the schooner by the plaintiff, to be carried from Boston to Charleston, S. C., on freight.

On the trial, before *Wilde* J., it was proved, that on the day after the schooner left Boston she met with tempestuous weather, which continued until she was driven on shore at Chatham in the county of Barnstable, and that for the purpose of lightening the vessel and saving her from destruction it was found necessary to throw the ice overboard; which was done accordingly.

The defendant's counsel contended, that the ice was of little or no value, and the expense of lading and unlading i

Digitized by Google

for the purpose of repairing the vessel would much exceed its value at the port of Chatham or at the port of lading; and the judge was requested to instruct the jury, that as the voyage was in fact broken up at Chatham, the plaintiff's claim should be adjusted upon the value of the ice at that port or at the port of lading.

But the judge instructed the jury, that the master had no right to break up the voyage to the prejudice of the plaintiff, against his consent, if they should be of opinion that the vessel might have been repaired in a reasonable time, so as to proceed on the voyage, or if not, if they should find, from the evidence, that another vessel might have been procured at the port of Chatham or any other port within a reasonable distance; and that in either case the master would have been bound to carry the cargo to its place of destination, unless the expenses of lading and unlading, freight, and all other expenses by law chargeable to the plaintiff, would by a just computation equal or exceed the value of the ice if it had been carried to Charleston. In making this computation the jury were instructed to estimate what would have been the expenses of bringing in the vessel and unlading and lading the cargo, for the purpose of making repairs, and that these expenses would be a general average on ship, freight and cargo, the cargo to be estimated at its value at the port of destination; and if the value of the ice should be found to exceed the amount of the average chargeable on the cargo and the freight &c., to return a verdict for the plaintiff for such excess, which would be the amount of the plaintiff's damages if the ice had been thrown overboard unnecessarily; and it was agreed that the verdict should be subject to be reduced by assessors, on the principles of general average.

The defendants also contended, that the ice could not be estimated for any purpose, above the sum of $ 500, at which it was valued in the bill of lading; but the jury were instructed as above stated.

The jury returned a verdict for the plaintiff for $ 372·25, founded on the value of the ice at Charleston.

If any of these instructions was wrong, a new trial was to be granted.

Digitized by Google

Tudor v. Macomber. March 29th.

D. A. Simmons and *Gay* for the defendants. The facts do not present a case for a general average. The ice was injured and would have melted, if it had not been thrown overboard; and it was not thrown overboard to enable the vessel to pursue her voyage, for there was no other cargo. Stevens on Average, 63.

In adjusting a general average, the value of the ice at Boston, if it was sound, or at Chatham, if it was damaged, should have been taken, and not the value at Charleston, as the vessel did not arrive there. Benecke, 288, 325; Stevens, 47 to 49; Phillips on Ins. 356, 357, 365; Abbott on Shipping, 358; Hughes on Ins. 295; *Douglas* v. *Moody*, 9 Mass. R. 554.

The valuation of the ice in the bill of lading is conclusive upon the parties. It is more than the value at the port of departure and less than the value at the port of destination, and was undoubtedly inserted in order to fix the contributory amount in case there should be a jettison.

Willard for the plaintiff. To the point that this was a case for a general average, notwithstanding the whole cargo was thrown overboard, he cited Stevens, 6, 9, 52, 65; *The Gratitudine*, 3 Rob. Adm. R. 258, 260.

The value of the ice at Chatham, even if a port in this State could be considered an intermediate port, is not to be taken as the basis of the calculation of the contributory interest, but the value at the port of lading or port of destination; and this last value is the rule applicable to the greater number of cases. *Simonds* v. *White*, 2 Barn. & Cress. 805; *Lewis* v. *Williams*, 1 Hall, (N. York) 430; Benecke, 295, 299, 325 to 327; Phillips on Ins. 356, 357, 362, 365; Stevens, 49, 50, 57; *Leavenworth* v. *Delafield*, 1 Caines's R. 574; *Douglas* v. *Moody*, 9 Mass. R. 554; *Spafford* v. *Dodge*, 14 Mass. R. 79, 80; Pothier on Marit. Contr. (by Cushing) 74. The value in the bill of lading is not conclusive as between the shipper and ship-owner. Abbott, 357; *Welles* v. *Gray*, 10 Mass. R. 42; *Simonds* v. *White*, 2 Barn. & Cress. 805; Phillips, 365; *Barrett* v. *Rogers*, 7 Mass. R. 297; *Maryland Ins. Co.* v. *Ruden's Administrator*, 6 Cranch, 338 *Bates* v. *Todd*, 2 Moody & Malk. 106.

Digitized by Google

PUTNAM J. delivered the opinion of the Court. The jury have established the facts, that there was a necessity to make the jettison, and that the vessel was saved thereby; and the question for the Court is, whether the value of the cargo at Boston, or the value at Charleston, should be taken as the rule in the computation of the general average.

If (as has been stated and not denied at the argument) the ice, which constituted the whole cargo, could have been landed in Chatham, the port of distress, in good order, and the vessel could have been repaired, in a reasonable time, at an expense less than fifty per cent. on her value, or if not, if another vessel could have been procured in a reasonable time to transport the cargo, it would have been the duty of the master to have proceeded upon and finished the voyage.

If the cargo could have been saved instead of being thrown away, it would not make a case of general average. It would seem to be very clear in such case, that if it were necessary to uniade it, there was no necessity to sacrifice it for the relief of the vessel. This would be very obvious if the cargo were a valuable one. If, for example, it had been a cargo of coffee, and could have been landed safely and reladen after the vessel should have been repaired, there would be no reason to claim a contribution for the value of the cargo, but only for the expenses of unloading and reloading, and for any damages incidentally happening during these operations. But the principle is the same in both cases.

If there were a necessity to throw over the cargo for the safety of the vessel, and it were partially damaged from the perils of the sea independently of the jettison, such partial damage should be deducted from the sound value. For such partial loss the owner might have a claim upon the underwriter, or he must bear it as being his own insurer. We understand, rather from the admission of the parties at the argument than from the report of the case, that the ice was greatly injured by the salt water, before it was thrown overboard; and the amount of that damage must be ascertained and deducted from the full value of it in good condition.

But to return to the question, how shall the value of this cargo be calculated? According to the price at the port of

Digitized by Google

Tudor v. Macomber.

destination, deducting freight &c., or that at the port of loading? Certainly one or the other, and not according to the price at the port of distress, where it could not be sold and was not probably of any value at all. If the price at the port of destination is to be taken, then the freight should contribute to the general average loss. If the voyage is broken up, and the vessel returns to the port of loading, then no freight would be earned, and the contribution would be between vessel and cargo only.

The old rule, that where more than half of the voyage had been performed, the value of the jettison should be the price of goods at the port of destination, and where less than half had been performed, the value at the port of departure should be taken, has been exploded. The rule may be seen in Molloy, *bk.* 2, *c.* 6, § 4. It is of very difficult and uncertain application. If the ship arrives at the port of destination, it is of no consequence to the owner of the goods, whether they were thrown overboard in the first or the last part of the voyage. Such an inquiry would be as useless as it would be difficult to solve.

We think that if the vessel arrives at the port of destination, the value should be the net price for which the cargo might have been sold there. Benecke, 286 *et seq.*; Abbott, (4th Amer. edit.) 357. That is undoubtedly the rule in Great Britain, France, Spain and Prussia. Benecke, 283. But, says the same author, should a jettison take place so near the port of departure, that the vessel returns to the same or to a neighbouring port, the actual price of replacing the goods thrown overboard should be allowed; or if that could not be done, the *cost price*, including shipping charges and premium of insurance, should be the rule by which the value of the goods jettisoned should be ascertained. Ibid.

We think this is the sound rule in such case.

In Westk. 29, *Average*, § 11, it is said, the valuation in the *policy* is not to conclude the parties in the settlement of a general average, which should be calculated upon the true value of the ship, goods or freight; it is otherwise in case of a total loss. But this does not interfere with the rule we adopt in taking the *invoice* value as the true value, including

Digitized by Google

all costs and charges. If the policy should contain a less valuation than the invoice, it should be opened, just as it would be in respect to the ship, to ascertain the true or invoice value.

But this cargo had no market price here. The value consisted in the expense of cutting the ice from the pond and transporting it to the vessel, loading &c., which in the bill of lading is set down at a certain price. As a general rule, this valuation of the cargo, without fraud, would be conclusive between the owner of the cargo and the owner of the ship, in the adjustment of the general average at the home port.

If the goods had arrived at the port of destination in safety, the owner would have realized the price there. He suffers just so much loss as was caused by the jettison, which could be there accurately estimated. And the freight would then be brought into the contribution. But where, as in the case at bar, the voyage is broken up near the port of departure, and the vessel has not adopted an intermediate port as and for the port of destination, but has returned home, and the freight has not been saved by the jettison, the contribution to the general average loss should be between the ship and the cargo, upon the assumed value of the cargo at the port of departure. This we think furnishes an exact rule; whereas the adopting of the value at the port of destination would in such a case be uncertain, depending upon matters of opinion instead of matter of certainty.

A new trial is granted, which will proceed upon the principles before stated. The jury will find whether or not there was a necessity for the destruction of the plaintiff's property by jettison, and if so, they will take the value contained in the bill of lading (there being no invoice) as the *cost price* of the property on board, inclusive of all charges.

New trial granted.

Digitized by Google

Ex Parte William Seymour.

In the statutes of 1817, *c.* 176, § 5, 6, and 1827, *c.* 118, § 19, 20, which provide that whenever any person who shall be convicted of any crime, the punishment whereof shall be confinement to hard labor "for any term of years," shall have been before sentenced to a like punishment, he shall be sentenced to punishment in addition to that by law prescribed for the offence of which he shall be convicted, the words *term of years* mean a period of time not less than two years.

April 3d. Shaw C. J. delivered the opinion of the Court. This is a petition of William Seymour, a convict in the State prison, praying for a writ of *certiorari*, for the purpose of bringing before the Court the record of the conviction, under which he has been sentenced for life.

The petition sets forth, that the petitioner, at the Municipal Court, September term 1831, was sentenced to confinement to hard labor for life, by way of additional punishment, under the statute imposing such additional punishment in certain cases, upon a third conviction. The question is, whether upon the three convictions, as they are described in the petition, and appear more fully by a transcript of the record, the petitioner was by law liable thus to be sentenced to hard labor for life.

The first conviction was at the Supreme Judicial Court at Springfield, in September 1827, for larceny in a dwelling-house, for which he was sentenced to six days' solitary imprisonment, and to hard labor for one year.

The two other convictions were had at the Municipal Court, October term 1828; one of which was for larceny in a dwelling-house, and stealing therefrom jewelry, to the value of less than $ 100, for which he was sentenced to confinement at hard labor, two years.

The other conviction was had at the same term for stealing bank bills and money to the amount of $ 46, without other aggravation, being a simple larceny, for which he was sentenced to hard labor for one year, to take effect after the expiration of the preceding sentence.

As to these two convictions being had at one and the same term of the Municipal Court, it was decided in the case *Commonwealth* v. *Phillips*, 11 Pick. 28, that two con-

Digitized by Google

victions, at the same term of any court, being such as are in other respects within the statute, are two convictions within the intent and meaning of the statute, though the law in this respect was afterwards, and after the conviction now under consideration, altered by *St.* 1832, *c.* 73.*

The first conviction of the petitioner in the Municipal Court, was for an aggravated larceny, that of stealing in a dwellinghouse, punishable by law by solitary imprisonment and confinement to hard labor for a term not exceeding five years, and actually punished in this case by a sentence of two years. But the other conviction at the same term of that court was for a simple larceny, in stealing bank notes and money to an amount less than $ 100, and that without any of the aggravations mentioned in the statute, such as stealing from a dwellinghouse, or from the person, or the like. This offence, of larceny without aggravation, to an amount less than $ 100, is by *St.* 1804, *c.* 143, § 1, punishable by confinement to hard labor, for a term not exceeding one year.

This case therefore presents the question, whether by the true construction of the statutes, such a simple larceny is a crime, the punishment whereof is by law, confinement to hard labor for any term of years, rendering the party convicted liable to be sentenced for life under the provisions of *St.* 1817, *c.* 176, § 5, 6, and *St.* 1827, *c.* 118, § 19, 20. The Court are all of opinion that it is not.

These statutes are in a high degree penal, and ought not to be extended beyond a strict construction, to enhance the penalties prescribed. The manifest design and intent of the

* This latter statute has since been repealed by *St.* 1833, *c.* 85, but the provision has been substantially re-enacted, by which it is provided that the second and third convictions, which shall render the convict liable to the additional punishment under these provisions, shall be those on which the convict shall have been at two several times sentenced to and discharged from the State prison, so as to make the law apply in effect to the second and third times respectively of coming to the State prison. But see Revised Stat. 810, 811, Act of Amendment, § 17, 54, which provides that when a convict shall have twice before been *sentenced* to confinement to hard labor, for a period of not less than one year each time, he shall be sentenced to an additional confinement to hard labor for life, or for a term of not less than seven years.

Digitized by Google

Ex parte Seymour.

legislature in these enactments was, to prevent the repetition and increase of crimes, by imposing increased penalties upon old offenders, and by inflicting a severer punishment, upon the repetition of crimes of the higher grade and of considerable magnitude. But what should or should not be deemed crimes of this character, it was difficult to designate by any definite description, being, as from the nature of the case they must be, so infinitely various and diversified in quality and degree of aggravation. Hence we think that it was the design of the legislature, by the description used, to designate the higher class of crimes, by the kind and degree of punishment, to which the offender should be liable, by the law existing for the time being. The nature of the offence would in some measure be indicated by reference to the punishment by confinement to hard labor, now the most infamous and severe punishment except capital, known to the law, and the degree and aggravated character of the offence would be estimated by the length of time fixed by law for its punishment. With these views, we think, the words were used, "confinement to hard labor for any term of years." The question is, what length was intended by the use of this language.

The use of this term in the law relative to leases, and the authorities cited in the argument, upon that subject, can have very little bearing upon the case, being there used for another and distinct purpose. If, as in case of a lease, it be contended that it means a *certain*, in contradistinction to an uncertain period of time, it manifestly could not apply to confinement to hard labor, as a punishment on conviction of a crime, because, from the nature of the case, such imprisonment must be for a certain time, limited by the law, and fixed in each particular case by the sentence. Such a construction would make the provision apply to all cases of confinement to hard labor as a punishment, without regard to its length, because it must necessarily be for a *certain* time, and the other part of the clause, "for any term of years" would be wholly nugatory and without effect. Another consequence would be, that no distinction would be expressed, by the different length in the periods of time with which they are punishable.

Digitized by Google

between slighter and more aggravated crimes, which are punishable by confinement to hard labor.

We think the only mode of giving a reasonable and sensible construction to the statute is, to consider those words as introduced for the purpose of describing the higher classes of offences, distinguishing from among crimes, all of which are by law punishable by confinement to hard labor, for longer or shorter periods, according to their aggravation, those of sufficient magnitude to be punishable by a long period of confinement to hard labor. Considering this to be the object and purposes for which this clause was introduced into the statute, we think the natural and legal, as well as the literal and grammatical construction of the words, "any term of years," must be a period of time not less than two years. We are therefore all of opinion, that a simple larceny of goods under the value of $ 100, when by law it is not punishable by confinement to hard labor for a longer term than one year, is not one of the crimes contemplated by the statute upon conviction of which, among others, the convict was liable to be sentenced to confinement at hard labor for life, and that in this respect the conviction and sentence before the Municipal Court in September 1831 were erroneous.

Certiorari awarded.

S. D. Parker, for the petitioner, cited Bac. Abr. *Leases &c.*, *L* 3; 4 Com. Dig. (Hammond's edit.) 88, *Estates by Grant*, *G* 11, note *m*; *Denn* v. *Cartwright*, 4 East, 32; *Birch* v. *Wright*, 1 T. R. 380; Shep. Touch. 267; *Commonwealth* v. *Keniston*, 5 Pick. 420.

Austin, Attorney-General, for the commonwealth.

Digitized by Google

ZEBINA EASTMAN *versus* JOHN WINSHIP *et al.*

If a witness offered by the plaintiff has become interested in the event of the suit by a *bonâ fide* contract with the defendant, made in the regular course of business and without any intention on the part of the defendant or the witness to deprive the plaintiff of his testimony, he is incompetent, although such interest was created after the plaintiff had become entitled to his testimony.

In an action by an indorsee against W. on two promissory notes, one of which was made by W. and indorsed by J., and the other was made by J. and indorsed by W., it appeared, that after the execution of the notes but before their maturity, J. had failed in business and assigned his property for the benefit of his creditors, and had been in consequence thereof released by W. from all liabilities to him. It was *held*, that J., who was offered as a witness by the plaintiff, was not incompetent, as being interested in the event of the suit; for he would still be liable to the plaintiff, whether the plaintiff recovered judgment against W. or not, and the judgment in this suit could not be given in evidence in an action against J.

THIS was assumpsit against John Winship, Amos Binney, and John Binney, on two promissory notes, one dated July 29, 1825, for 1200 dollars, signed by Winship and payable in 60 days to Samuel Jaques or order, by whom it was indorsed, the other dated July 21, 1825, for 1000 dollars, signed by Jaques, payable in 60 days to Winship or order, by whom it was indorsed.

Winship was defaulted; and the other defendants pleaded the general issue, which was joined.

At the trial, before *Wilde* J., it was proved that the defendants, at the time when these notes were given, were copartners in the manufacture of soap and candles, which business was carried on in the name of Winship alone; that the notes in question were sold to the plaintiff, by Winship, through the agency of a broker, it being represented to the plaintiff, at the time of the sale, that they were made and indorsed for the use of the partnership; and that the proceeds were paid over to Winship. The plaintiff offered Jaques as a witness, but the defendants objected to his competency, on the ground that he had been released by Winship from all liability to him on these notes, and therefore was interested in the event of the suit.

It appeared that on August 28, 1825, which was before the maturity of the notes, Jaques, having failed in business, made an assignment of his property, in trust for the payment

Digitized by Google

of his debts, including all claims which Winship might have upon him by virtue of any notes made by Jaques and indorsed by Winship, or made by Winship and indorsed by Jaques; and it was provided that the holders of such notes should be considered creditors, for the purposes of the instrument of assignment, only for such part of the contents of such notes as came to Jaques's use and possession, and that the assignees should, to that extent, indemnify Winship for that proportion of such notes *pro ratâ* with other creditors of the class; that the accounts between Jaques and Winship, concerning former transactions, should be adjusted, and the balance, if in favor of Jaques, should go towards the indemnity provided for Winship, and if in favor of Winship, should be a debt in this class of debts; and that Winship might execute the instrument, as representing his interest in such notes when paid. Then followed a schedule of the notes made by Jaques in favor of Winship, amounting to $ 14,250 dollars, and of three notes, made by Winship in favor of Jaques, amounting to 4,200 dollars. The notes in question were on the schedule.

Winship became a party to the assignment, whereby the creditors released Jaques from all claims, demands and causes of action, which they had or might hereafter have against him for or on account of the several debts and sums of money set opposite to their respective names on the schedule.

Jaques was admitted as a witness, the question of his competency being reserved for the consideration of the whole Court; and the jury rendered a verdict for the plaintiff.

If the Court should be of opinion, that he was incompetent, the verdict was to be set aside and a new trial granted; otherwise, judgment was to be entered on the verdict.

March 15th 1832.

S. Hubbard and *C. G. Loring*, for the defendants, referred to *Winship* v. *Bank of the United States*, 5 Peters, 529, and the cases there cited.

Rand and *Fiske* for the plaintiff. The witness stands in the same relation to Winship, as a co-trespasser does in an action against one of several trespassers; and it is clear, that in such action a co-trespasser is a competent witness. *Blackett* v. *Weir*, 5 Barn. & Cressw. 387; Buller's N. P. 286; *Chapman* v. *Graves*, 2 Campb. 333, note; *Morris* v.

Digitized by Google

Eastman v. Winship.

Daubigny, 5 Moore, 319 ; *Berkeley* v. *Dimery*, 10 Barn. & Cressw. 113, note ; *Hall* v. *Curzon*, 9 Barn. & Cressw. 646.

Supposing the release by Winship to Jaques to refer tc these particular claims, it would be ineffectual, because, as the notes were outstanding in other hands, there was no right or obligation which could be the subject of the release. Shep. Touch. (Preston's edit.) 321.

The interest of the witness, if he is interested, does not disqualify him, for it was created by the agency of the defendants after the plaintiff had acquired a right to his testimony. *Burgess* v. *Lane*, 3 Greenl. 165.

April 3d. WILDE J. delivered the opinion of the Court. The only question to be considered is whether Jaques was a competent witness.

This question was fully argued, but not decided, in *Winship* v. *The Bank of the United States*, 5 Peters, 529, the Court being divided in opinion as to this point. The arguments in that case, and the authorities cited, have been referred to by counsel, and considered by this Court, and upon the whole, we are of opinion that Jaques was a competent witness.

The objection to the competency of the witness is, that he was interested in the event of the suit, because, after the making of the notes sued, Winship gave to the witness a general release of all liabilities to him on account of these notes ; and it is argued, that if the plaintiff should recover in this action the defendants could not recover over against the witness, whereas he would remain liable to the plaintiff if he should fail to recover against the defendants.

Several answers have been given to this objection. First, it is said, that the interest of the witness, if any, was created by the act of the defendants, after the plaintiff had become entitled to his testimony. The cases cited on this point are such as show management by one of the parties to deprive the other party of the benefit of testimony, as by laying a wager with the witness as to the event of the suit, or where a witness has a like wager with another, without the consent of the party entitled to his testimony, and the like. In such cases, it would be against the manifest principles of justice to allow

Digitized by Google

a witness thus to disqualify himself. But the reason does not apply to a case like the present, in which the witness acquired an interest, such as it was, by a fair *bonâ fide* contract in the course of business, without any intention on the part of the defendants or the witness to deprive the plaintiff of the benefit of his testimony. This distinction is noticed by Lord *Ellenborough* in *Forrester* v. *Pigou*, 1 Maule & Selw. 14, and is founded on the plainest reasons.

In the second place, it was objected to the operation of the release, that the defendants or Winship, at the time, had no demand against the witness, upon which the release could operate. This may be true, but perhaps the release might well operate by way of estoppel or some other way; but as to this we give no opinion, because we think, that the remaining answer to the defendants' objection is decisive.

For, admitting that the release discharged the witness from his liability to the defendants, still he is not interested in the event of this suit. He will be still liable to the plaintiff, whether he recovers judgment against the defendants or not; and it is clear, that the judgment in this suit cannot be given in evidence in an action against the witness. It is said, that it is to be presumed the plaintiff will follow up his legal rights, and if he should recover judgment he will obtain satisfaction. But we do not even know, that he will be able to obtain satisfaction; the defendants may become insolvent, though, in this particular case, there is no reason to suppose they will; but the question of the competency of the witness is not to be determined by the solvency or insolvency of the defendants. It is not a question what will be the probable effect of a recovery by the plaintiff, but what will be its immediate and certain effect upon the witness's liabilities; for if the interest is contingent and uncertain, it will go to the credit of the witness, and not to his competency. 2 Stark. Evid. 745. It is also said, that the distinction taken by the plaintiff's counsel is new and unsupported by the authorities. It may be, that there is no case precisely in point, but the principle, on which the distinction is founded, has been frequently recognised. The interest, which the witness Jaques had, was similar to that of a co-trespasser, and it is perfectly

Digitized by Google

Eastman v. Winship.

well settled, that in an action of trespass against one of several trespassers, a co-trespasser may be admitted as a witness for either party. *Blackett* v. *Weir*, 5 Barn. & Cressw. 387; *Hall* v. *Curzon*, 9 Barn. & Cressw. 646. Indeed the interest of a co-trespasser is much stronger, if it be true, as Lord *Tenterden* says, that a recovery against one of several co-trespassers is a bar against the others. If the law were so, it would be difficult to discover any good ground, on which a co-trespasser could be admitted as a witness for the plaintiff; for he would be directly interested in the event of the suit, as by the plaintiff's recovering judgment he would be discharged from a liability. But I apprehend, that the law is now well settled, as laid down by Lord *Ellenborough* in the case of *Drake* v. *Mitchell*, 3 East, 258. He says, a judgment recovered in any form of action, is but a security for the original cause of action, until it be made productive in satisfaction to the party; and, therefore, till then, it cannot operate to change any other collateral concurrent remedy, which the party may have. This point is considered in *Campbell* v. *Phelps*, 1 Pick. 70; and is ably discussed in a note by Mr. Metcalf, in Yelverton, 68. But this point is immaterial in the present case, as it is well settled that a co-trespasser may be admitted to prove, that he did the act by the command of the defendant; and it is clear, that Jaques had not a greater or more certain interest in the event of the suit, than a co-trespasser would have in an action of trespass, he not being a party. The recovery by the plaintiff cannot, without satisfaction, discharge Jaques from his liability, whatever may be the law in regard to a recovery by the plaintiff in an action of trespass against one of several co-trespassers. He was not, therefore, interested in the event of the suit; but if he were under any bias, it was an objection to his credibility, and not to his competency.

Judgment according to verdict.

Digitized by Google

SETH THAXTER *versus* JOHN D. WILLIAMS *et al.*

Upon a petition to the Court of Common Pleas, pursuant to *St.* 1819, *c.* 156, to enforce a supposed lien on land and on a building erected thereon, for labor and materials furnished under a contract for erecting the building, the owner of the land may come in and make answer to the petition, although he was not a party to the contract.

A contract made by a mechanic with a person in possession of land as a mere intruder or as a tenant, to erect a building thereon, does not create a lien, under *St.* 1819, *c.* 156, on the land and the building erected in pursuance of such contract, as against the owner of the land.

Where a mechanic, in pursuance of a contract made with a person having a covenant for the conveyance of land, furnished materials and erected a building on the land, and afterwards such covenantee received a deed of the land but at the same time mortgaged it to a third person who advanced the purchase money, it was *held*, that as the covenantee had but an instantaneous seisin, no lien attached upon the land and building in favor of the mechanic for the labor and materials furnished by him.

THIS was a petition to the Court of Common Pleas, under *St.* 1819, *c.* 156, securing to mechanics and others payment for their labor and materials expended in erecting and repairing houses and other buildings, with their appurtenances.

The petitioner, who is a housewright, alleges, that on March 4, 1826, a contract in writing was made between himself and one Henry Smith, since deceased, the proprietor of certain land described in the petition, situate in South Boston, for erecting thereon a house and other buildings and furnishing labor and materials therefor, which contract was made and intended by the parties thereto to operate and create a lien to secure the payment of the same, upon the buildings and appurtenances and upon the land; that the contract was duly recorded in the registry of deeds; that the petitioner has completed the contract on his part, and that a large sum of money is due to him by virtue thereof; and he prays for a sale of the land with the appurtenances, and for further proceedings, pursuant to the statute.

Notice of the petition was ordered to be given to the administrator of Smith and to all other persons interested in the land.

The respondents, John D. Williams and Moses Williams, appeared and filed an answer, in which they allege, that they

Digitized by Google

Thaxter v. Williams.

had no knowledge of the existence of the contract between the petitioner and Smith referred to; that on March 4, 1826, Smith was not the proprietor of the land, and that he did not become the proprietor until June 15, 1827; that by a deed of that date the corporation, called the South Boston Association, in consideration of $ 960, conveyed the land to Smith, and that at the same time and as a part of the same transaction, Smith, by his deed of mortgage, in consideration of $ 2400, granted the land to Nathaniel Staniford, and that a part of this sum was applied by Smith in payment of the $ 960, and that these two deeds were duly recovered that the respondents afterwards, for valuable considerations, purchased the mortgage and the equity of redemption, having first caused an examination to be made at the registry of deeds in order to ascertain whether Smith had made any conveyance after he had acquired his title by the deed of June 15, 1827, and that by force of the deeds made to them by Staniford and Smith they became seised in fee of the premises in question, free of the supposed lien set up in the petition.

The petitioner protested against the right of the respondents to appear in the case, but if they had such right, then he demurred to their answer.

It was admitted at the argument, that on March 4, 1826, Smith held a written contract, but which was never recorded, whereby the South Boston Association agreed to convey to him the land in question upon his paying certain promissory notes given by him as the consideration for that contract, and that he had paid some of the notes.

S. D. Parker for the petitioner. The *St.* 1819, *c.* 156, provides that when any contract shall be made in writing between the *proprietor* of land, on the one part, and any person, on the other part, for the erecting any building, the person who shall, in pursuance of such contract, have furnished labor or materials for such purpose, shall have a lien to secure the payment of the same, upon such building, and the lot of land on which the same stands, and upon the right of redeeming the same when the same has been previously conveyed in mortgage, provided that no such lien shall attach unless such contract shall have been recorded &c., and that

Digitized by Google

any person having such a lien, may petition the Court of Common Pleas to order a sale of such land with the appurtenances; in which case the court shall order notice to be given to all the creditors having a lien, as aforesaid, on such estate, to appear and make out their claims under such contracts, and the *owner* of such estate to show cause why a decree that such estate should be sold, should not be passed. In the 4th section it is enacted, "that whenever the *owner* of any such estate shall have so failed to perform his contract" &c. It is manifest from these provisions, that the words *proprietor* and *owner* are used to denote the person who makes the contract, and he is the person to whom notice is to be given and who is to appear and make answer to the petition. The respondents might appear in order to reduce the amount claimed by the petitioner, but not for the purpose of contesting the lien.

But if the respondents have a right to appear, they do not state a valid defence to the petition. The statute intended to give the mechanic a lien for his labor and materials against all persons. He works openly on the land, and any one interested should examine the records and ascertain whether he has perfected his lien by complying with the requisitions of the statute. Smith being in possession when he entered into this contract, whether he had a title or not, is immaterial; the statute does not require the mechanic to look into the title. Nor does this work injustice, for the true owner of the land ought not to receive the benefit of the betterments without paying for them. Though the land and building are to be sold together, the statute presumes that there will be a surplus equal to the value of the land, which surplus is to be paid over to the owner of the land. But Smith was the owner; he had paid part of the consideration, and the South Boston Association stood seised to his use. At all events he became the proprietor on receiving a deed from the corporation and the lien then attached. In case of a sale all which the petitioner has a right to sell will pass to the purchaser, and if the respondents hold him out, he may bring his action against them and try the title; it was not intended by the legislature that it should be tried by the mechanic in this collateral manner.

Digitized by Google

Thaxter v. Williams.

Cooke for the respondents. To show that the title might be tried upon this petition, he referred to the statute above mentioned, and to *Ex parte Allen*, 15 Mass. R. 58, and *Scott* v. *Hancock*, 13 Mass. R. 162.

Smith had but an instantaneous seisin; and his contract therefore could not create the lien set up by the petitioner *Holbrook* v. *Finney*, 4 Mass. R. 568; *Clark* v. *Munroe*, 14 Mass. R. 351; *Chickering* v. *Lovejoy*, 13 Mass. R. 55.

The laches of the petitioner constitute a defence. If he had examined the records before he entered into the contract, he would have found that Smith had no title at that time. On the other hand, the respondents used due diligence to ascertain the state of the title. *Connecticut* v. *Bradish*, 14 Mass. R. 302, 303; *Trull* v. *Bigelow*, 16 Mass. R. 406.

WILDE J. delivered the opinion of the Court. This process is founded on the *St.* 1819, *c.* 156, entitled, "an act securing to mechanics and others payment for their labor and materials expended in erecting and repairing houses and other buildings with their appurtenances."

The petitioner prays that the sale of a certain tract of land situated in South Boston, the property of one Henry Smith, may be ordered, in pursuance of the provisions of the statute. The petition alleges, that on the 4th day of March, 1826, a contract was made and executed by and between the petitioner on the one part, and Smith on the other part, for erecting on the land described in the petition, a dwelling-house and other buildings; that in pursuance of the contract the petitioner had erected the buildings, and that a large sum is due to him for labor, and materials furnished, in completing the contract on his part; and that he has a lien therefor on the land and buildings by virtue of the statute.

The respondent denies that any lien in favor of the petitioner has attached, because at the time of the contract with Smith he (Smith) had no title to the land; and that afterwards, when he acquired a title, he parted with it immediately, and that by such an instantaneous seisin no lien could by law attach.

A preliminary question was made by the counsel for the petitioner, as to the right of the respondent to become a par-

Digitized by Google

ty in this suit. The statute does not provide that any one should be notified of a petition for sale, except he is a lien creditor, or the owner of the land, and the statute supposes undoubtedly that the owner of the land would always be one of the parties to the contract by which the lien was created; but if he is not, there can be no good reason assigned why the owner should not be allowed to become a party, and to stop the petitioner's proceedings *in limine* to prevent unprofitable litigation. If the statute had been silent on the subject of notice, still the Court would not order a sale if it could be shown that the sale would be void in law; and this may undoubtedly be shown by the owner of the land.

It was in the next place argued on the part of the petitioner, that the lien attached, whether Smith had any title to the land or not; that naked possession was sufficient to enable him to create a lien; but we think it is impossible o support this argument. The legislature have not the constitutional power thus to enable one person to violate the ight of property of another; and if they had, it is quite clear that they did not intend to exercise any such power by the statute in question. It is obvious, as has been already remarked, that it is supposed, as appears by the language of the statute, that the person contracting to have buildings erected or repaired for him is to be the owner of the property, and not a mere tenant or intruder. In the first section it is provided, that where a contracting party had, before the contract for building or repairing, mortgaged the estate, the lien should attach to the equity of redemption: which would be a senseless provision on the construction of the statute contended for by the counsel for the petitioner.

So in the third section the owner of the property is to be notified, meaning thereby no doubt the person contracting for the erection of buildings, or for repairs. It seems therefore clear, that it is not the intention of the statute to enable a man to create a lien on an estate in which he has no interest, but that the lien is to attach to and to be limited by the contracting party's right and title in the land.

It is also clear, that in 1826 Smith was not the owner and proprietor of the land on which the buildings have been erec

Digitized by Google

Thaxter v. Williams.

ted. It is true he had contracted for the purchase of the land with the proprietors, (the South Boston Association,) had paid part of the purchase money and had a bond for a deed; but he had no legal title to the land. If he had possession, he was a mere tenant at will.

The remaining question is, whether the lien did not attach afterwards, when Smith received a deed from the South Boston Association; and we are of opinion that it did not. The respondent, in his plea, avers that the conveyance from the South Boston Association to Smith, and his deed to Staniford, under whom the respondent claims, were made at the same time, and were parts of the same transaction. This averment is not traversed or denied by the petitioner. Smith therefore had a seisin only for an instant. He received and parted with the fee at the same time, and was but the instrument of conveyance to Staniford. To such an instantaneous seisin no lien could by law attach. This principle is fully established by *Holbrook* v. *Finney*, 4 Mass. R. 566, and *Chickering* v. *Lovejoy et al.*, 13 Mass. R. 51, and indeed by numerous other decisions. There is therefore no ground on which this petition can be sustained.

Petition dismissed.

Digitized by Google

JOHN D. BRIDGE *et al. versus* WILLIAM GRAY *et al.*

In assumpsit for goods sold and delivered, an account of which was annexed to the writ, the defendant pleaded in bar a former judgment recovered by the plaintiff against him upon a writ containing, among other counts, a general count for goods sold and delivered, which might have embraced the claim which was the subject of the subsequent action. It was *held*, that the record of the former judgment was *prima facie* evidence of a prior adjudication of such claim; and that evidence *aliunde* was admissible to prove that such claim had not been considered and determined in the prior action.

After the dissolution of a partnership between an active and a dormant partner, an action for the balance of an account was brought against both, in which the dormant partner pleaded payment, and the active partner, who was, by mutual consent, constituted agent to settle the partnership concerns, was defaulted. It was *held*, that an admission by the active partner, that such balance, in consequence of a mistake, had not been paid, made after the dissolution of the partnership, was competent evidence.

ASSUMPSIT to recover the balance of an account for goods sold and delivered, which was annexed to the writ. The whole account amounted to $ 241·22, on which there was credited, by the plaintiffs, the sum of $ 201·22, as paid by a promissory note, leaving a balance of $ 40 as still due.

The writ was dated September 23, 1828.

John G. Usher, one of the defendants, was defaulted. The other defendant, Gray, pleaded, 1. a former recovery; 2. payment; 3. that the defendants were exonerated and discharged by the plaintiffs. Upon these several pleas issues were joined.

At the trial in the Court of Common Pleas, before *Ward* C. J., the defendant Gray, in order to support his first plea, produced a record of the Supreme Judicial Court, by which it appeared, that at the October term 1826, of this Court, in an action between the same parties, the plaintiffs recovered judgment against the defendants for the sum of $ 319·78, damages and costs; and that the declaration in that suit consisted of a count on a promissory note for $ 201·22, a count on an account annexed, for $ 192·61, and several general counts for goods sold and delivered, amounting to $ 400. The goods mentioned in the account annexed to the writ in that suit, were different from those in relation to which the present action was brought.

Digitized by Google

Bridge v. Gray.

The defendant contended, that as the claim in the presen action was for goods sold before the commencement of the former action, and might have been recovered under the counts for goods sold and delivered in that action, and as nothing appeared in the record to show that it was not then determined, the presumption must be that it was then passed upon by the jury; and so that this claim was barred by the former recovery.

In order to prove that the present claim was not passed upon in the former action, the plaintiffs produced several witnesses who were present at the former trial. They also offered to prove, by the testimony of the foreman of the jury in that trial, that the verdict of the jury was for the exact amount of the promissory notes and the account annexed; that the attention of the jury was not called to the counts for goods sold and delivered, and no evidence was given in support of them; and that they were not considered by the jury in their verdict.

The defendant objected to the evidence, but his objections were overruled.

To support his second and third pleas, the defendant produced a bill of parcels of the same goods as those mentioned in the account annexed to the writ in the present action, amounting to $241·22, which bill was receipted by the plaintiffs, as follows: — "Received payment by note."

In order to rebut this evidence, the plaintiffs produced the promissory note on which judgment was recovered in the former action, which they averred was the note referred to in the receipt. On the margin of this note were the figures $ 241·22, but the sum expressed and promised in the body of the note was $ 201·22 only; and the plaintiffs contended that the only sum received by them was that expressed in the body of the note, and that the residue, which was the subject of the present action, still remained due.

It was admitted by the defendant Gray, that in 1825, when the goods mentioned in the declaration in the present action, were sold and delivered, he was in partnership with Usher in the business of a grocer, in Charlestown; and it was proved, that the business was carried on in the name of Usher

Digitized by Google

alone, and that Gray was a dormant partner as respected the world in general; but it appeared that, before the sale of the goods, he had told the plaintiffs that he was a partner of Usher. It was also proved, that Usher failed in 1826; that all their stock in trade was attached and sold to pay the debts of the partnership; and that their business was broken up, and possession of their shop resumed by the owner.

The plaintiffs then offered a witness to prove, that in a conversation which he had with Usher, in May 1830, Usher admitted that the note for $ 201·22 was the same which was given in payment for the goods sold; that it was written for $ 201·22, instead of $ 241·22, through mistake; and that the balance of the account was justly due to the plaintiffs.

The defendant objected to this evidence, because the admissions of Usher were made after 1826, when the partnership, as Gray contended, was dissolved. The plaintiffs contended that the partnership was not dissolved; but if it was, they denied that they had had notice of the dissolution. The objection was overruled, and the evidence admitted.

As to the first issue, the judge instructed the jury, that if they were satisfied from the evidence, that the claim made by the plaintiffs in the present action, had not been considered and passed upon by the jury in the former action, the judgment in that action would form no bar to the right of the plaintiffs to recover.

The jury rendered a verdict for the plaintiffs. To the foregoing instructions the defendant excepted.

H. H. Fuller, for the defendant, cited to the point, that the admissions of Usher were not competent evidence, *Brandram* v. *Wharton*, 1 Barn. & Ald. 463; *Atkins* v. *Tredgold*, 2 Barn. & Cressw. 23; *Bland* v. *Haselrig*, 2 Ventr. 151; *Tuttle* v. *Cooper*, 5 Pick. 414; *Hathaway* v. *Haskell*, 9 Pick. 42; *Hackley* v. *Patrick*, 3 Johns. R. 528; *Walden* v *Sherburne*, 15 Johns. R. 409; *Baker* v. *Stackpoole*, 9 Cowen, 433; 3 Kent's Comm. 25; *Levy* v. *Cadet*, 17 Serg. & R. 126; *Rootes* v. *Wellford*, 4 Munf. 215; *Chardon* v. *Oliphant*, 2 Constitut. R. 685; *White* v. *Union Ins. Co.*, 1 Nott & M'Cord, 561; *Evans* v. *Duberry*, 1 Marshall, (Kentucky,) 189; *Ward* v. *Howell*, 5 Har. & Johns. 60; *Clementson* v. March 28.

Digitized by Google

Bridge v. Gray.

Williams, 8 Cranch, 72; *Thompson* v. *Peter*, 12 Wheat. 567, *Bell* v. *Morrison*, 1 Peters, 371.

J. G. Rogers, for the plaintiffs, to the same point, cited *Wood* v. *Braddick*, 1 Taunt. 104; *Thwaites* v. *Richardson*, Peake's R. 16; *Grant* v. *Jackson*, Peake's R. 203; *Evans* v. *Drummond*, 4 Esp. R. 91; *Lacy* v. *McNeil*, 4 Dowl. & Ryl. 7; *Bulkley* v. *Langdon*, 3 Connect. R. 76; *M'Intire* v. *Oliver*, 2 Hawks, 209; *Parker* v. *Merrill*, 6 Greenl. 41; *Van Reimsdyk* v. *Kane*, 1 Gallison, 630; *Simpson* v. *Geddes*, 4 Bay, 533; *Norden* v. *Williamson*, 1 Taunt. 378; *Whitcomb* v. *Whiting*, 2 Dougl. 652; *White* v. *Hale*, 3 Pick. 291; *Jackson* v. *Fairbank*, 2 H. Bl. 340; *Perham* v. *Raynal*, 2 Bingh. 306; *Pittam* v. *Foster*, 2 Dowl. & Ryl. 363; *Smith* v. *Ludlow*, 6 Johns. R. 267; *Johnson* v. *Beardslee*, 15 Johns. R. 3; *Shelton* v. *Cocke*, 3 Munf. 197; *Lowe* v. *Boteler*, 4 Har. & M'Hen. 346; *Hunt* v. *Bridgham*, 2 Pick. 581.

The only question here is, whether the admissions of Usher constituted *a new contract*. We think they did not, for there was no new consideration. Besides, the original contract is admitted by the pleas of Gray and by the default of Usher. The objection, therefore, that Usher could not bind Gray, by a new contract, does not apply. In this case no new promise is required. Indeed, if these admissions constituted a new promise, it would be decisive against the plaintiffs; for as they were made after action brought, they would then have a right to bring an action upon such new promise, after a decision against them in the present case.

This is a question of *evidence* and not of *contract*. Admissions of this nature are competent evidence, because they are against the interest of the party by whom they are made. The cases cited show that the interest of the party making the admissions, is the criterion by which their admissibility is determined. In the present case, if the plaintiffs recover, Usher will become liable as well as Gray, and it makes no difference, in this respect, whether Usher has property or not. Neither does the default of Usher affect the question; for if no judgment is recovered against Gray, there can be none against Usher.

Digitized by Google

It would be singular, if Usher could pay the debt and charge it to the co-partnership, that he could not admit it; the danger of fraud is the same in both cases.

The plaintiffs stand in a better situation than if these were admissions of a debt barred by the statute of limitations; under the statute it is presumed that the debt has been paid, and the evidence of payment has been lost. But here there is no danger that such evidence has been lost; there has not been such a lapse of time as will excuse the not taking care of vouchers.

Usher was the sole acting partner; and his admissions should have more weight than if other persons had been held out to the world as partners. If the action had been brought against him alone, he could not have pleaded the partnership. So a demand against him alone could be set-off against a debt due to the partnership. *George* v. *Clagett*, 7 T. R. 359; *Lord* v. *Baldwin*, 6 Pick. 348. So a dormant partner cannot dissent from a contract of the active partner before it is made; it is otherwise where both partners are active.

April 3d.

Shaw C. J. delivered the opinion of the Court. This case comes before the Court upon exceptions to the opinions of the chief justice of the Court of Common Pleas, at the trial. Several exceptions were taken which have not been relied upon with much confidence; the attention of the Court has been principally drawn to two questions.

On the issue joined upon the plea in bar of a former recovery, the defendant relied upon a judgment in a former suit, upon a writ containing among others, counts for goods sold and delivered, and which might have embraced the goods sued for in the present action; but there was no specific enumeration or description of goods contained in these counts, nor any account annexed to the writ or other specification filed, by which it could be shown, that the goods, in question in this suit, were embraced in that. The defendant relied upon that judgment as a bar, and as conclusive evidence, that the claim for goods sold, now made in this suit, must have been considered in the former. But the plaintiff offered evidence *aliunde*, to show, in point of fact, that no claim was made in that action for the goods now sued for. We

Digitized by Google

Bridge v. Gray.

think, that this evidence was rightly admitted. The modern mode of declaring in most general use, is to insert several general counts; and when, in such case, the general issue is pleaded, a vast variety of different claims may be put in issue and tried; so various indeed, that in most cases, it is found necessary to call in the assistance of the court previously to the trial, to require the plaintiff to give in a bill of particulars, or specification of the claims which he means to give in evidence, in order to apprize the defendant of the actual claims relied on, which the declaration does not do, to enable him to go to trial with any safety. When such a judgment is pleaded in bar, it seems to be liberal enough, and going as far in support of a judgment as experience will warrant, to consider it as *primâ facie* evidence of a prior adjudication of every demand, which might have been drawn into controversy under it, leaving it, like other *primâ facie* evidence, to be encountered and controlled by any other competent evidence, tending to show that any particular demand was not offered or considered. And so, we think, the rule is now settled by authorities. *Seddon* v. *Tutop*, 6 T. R. 607; *Webster* v. *Lee*, 5 Mass. R. 334.

Supposing the evidence rightly admitted, it was left to the jury with proper instructions, to consider its weight and decide the question of fact.

But the most material question is, whether the admissions of Usher, after the period at which, as it is alleged, the partnership was dissolved, ought to have been received in evidence, to show that the note given in payment for the goods sold, was erroneously given for $ 201·22, instead of the sum of $ 241·22, the actual amount of the bill, and the sum for which the note was intended to be given.

No objection was taken to this evidence, as having a tendency to control or contradict the written evidence of the receipt; it being a well established exception to the general rule upon that subject, that a receipt may be controlled by parol evidence, showing that a less sum was paid, or that the receipt was given by mistake.

But the main question discussed is, whether on the trial of the issue against Gray, the defendant who pleaded the ad

Digitized by Google

missions of Usher, the other defendant, that the account was not paid, and that the note was given by mistake, were competent evidence. The Court are of opinion that this evidence was admissible. It must be considered as a general rule, that upon each joint contract, the admissions of each joint debtor as to the existence, payment and settlement of the joint debt, is admissible to bind the joint debtor; and to many purposes, the character of joint debtors being once established, must be deemed to continue until the debt is paid, or by some other means, legally cancelled, barred or discharged.

This case is entirely distinguishable from that of the acknowledgment of one partner, after a dissolution, taking a case out of the operation of the statute of limitations. To produce this effect the law requires proof of a new promise within six years, and an admission is only evidence from which a jury may infer such new promise. Now it may well be argued (of this however we give no opinion) that the power of binding partners by a new promise does not exist, after a dissolution, by which the mutual power of partners to bind each other by contract, has been revoked; and yet that after a joint liability has been shown, each may make binding acknowledgments and admissions, as evidence affecting the existence of that joint liability.

The existence of the partnership must be proved by evidence, other than such admissions, before the admissions are evidence against the partners. *Tuttle* v. *Cooper*, 5 Pick. 414. But when the partnership is proved, and a contract, falling within the scope of that partnership, which is of course a joint contract of the partners, the act of each in regard to the payment or discharge of such joint contract, binds the whole. Each has a right to the custody of the partnership goods and effects, and to the application of them to any of the purposes of the partnership, each may collect and receive debts due to the firm, and give a good discharge or release, each would have power to bind the partnership by payment of a joint debt out of the partnership funds, which implies the power of judging and determining upon the question of the existence and non-payment of such debts; and why then should he

Digitized by Google

Bridge v. Gray

not be able to bind them by equivalent acts? But if it be true generally, that the act of each partner in this respect binds the whole, *à fortiori* shall the act of the ostensible and managing partner have that effect.

Indeed, it is not necessary to decide this case solely upon the general ground stated, because there is another, growing out of the circumstances of the present case, which appears to me quite clear of difficulty. The defendant Gray was strictly a dormant partner, and the whole of the business was done by and in the name of Usher. He made all purchases, payments and settlements, and no notice of dissolution of partnership was given. Under these circumstances, Usher may be considered as the agent for the partnership, for the payment and adjustment of all demands, until the settlement and close of the joint concern. Where a notice of dissolution is given, and one partner is referred to, as authorized to make all settlements, and a creditor applies to the party thus referred to, the acts and statements of the partner thus constituted agent, to the creditor thus applying, would be binding on the partners. It is analogous to the case of a person applied to for payment of a debt; if he refers the applicant to his attorney, whatever is said by the attorney thus referred to, is evidence against the party making such reference. Here the facts, showing how the business was conducted, justify the inference, that by mutual consent, Usher was constituted the agent to settle and close this partnership concern, even if he had not the authority simply as partner.

The Court are of opinion, that the evidence was properly admitted and that the instructions to the jury were correct; the exceptions are therefore overruled, and the judgment of the Court of Common Pleas affirmed.

Digitized by Google

JOSEPH RUSSELL *versus* ISAAC M'LELLAN

The equity jurisdiction given to this Court by *St.* 1823, *c.* 140, § 2, in disputes between partners, joint tenants and tenants in common, does not extend to cases between members of a manufacturing corporation.

It is not essential, in order that an act may take effect, incorporating individuals as a manufacturing corporation, that the records of the corporation should show a formal acceptance of the act, by the individuals incorporated.

Nor is it essential to the proper organization of such a corporation, that its records should show that notice of the first meeting had been given.

A purchase by only two individuals, pursuant to an agreement between them, of all the shares in such a corporation, does not dissolve the corporation, nor do these individuals become partners, joint tenants or tenants in common in consequence of such purchase.

The circumstance that such a corporation has been without officers for more than two years, and its omission to do any corporate act during that period, do not make the members partners, joint tenants or tenants in common, nor operate as a dissolution of the corporation.

THIS was a bill in equity, setting forth that the plaintiff and the defendant were owners of a manufactory in Framingham, from 1823 to the time of filing the bill; that in 1826 they organized themselves, under an act of incorporation passed in 1813, by the name of the Framingham Manufacturing Company; and that the business, both before and after such organization, was carried on by them jointly as partners; and praying for an account and for general relief.

At a hearing before *Shaw* C. J. it appeared, that on February 6, 1813, (by *St.* 1812, *c.* 75,) Calvin Sanger and others were incorporated as a manufacturing company, for the purpose of manufacturing wool and cotton, in Framingham, in the county of Middlesex; that the act of incorporation was accepted by the persons named in it, and they were organized as a corporation; that a mill site and other real estate were duly conveyed to the corporation by deed, and thereupon they proceeded to erect and put into operation a cotton factory, and divided their capital stock into sixteen shares.

In 1823, in pursuance of a written proposal made by the defendant, the plaintiff became the proprietor of eight shares, and the defendant became the proprietor of the remaining eight shares, and they continued to be thus solely and equally

Digitized by Google

Russell v. M'Lellan.

interested in the capital stock until they sold two shares to J. P. Osgood, after they had organized themselves as a corporation in 1826.

During the period from 1823 to 1826 the business of manufacturing was carried on in the factory under the direction of the parties, sundry goods were manufactured and sold, sundry parcels of stock were purchased, and moneys were advanced and received by the parties respectively, and some accounts were rendered by one to the other purporting to set forth some of their dealings. No regular corporate meetings were held during that period, but such formal proceedings as were had appear from two books produced by the defendant as the records of the corporation.

The first entry in one of these purports to be a copy of an indenture of fourteen parts, dated January 30, 1813, by which the parties thereto unite themselves into a company under the name of Calvin Sanger & Co.

The next entry, which is under date of June 1, 1813, begins thus: — "At the annual meeting of the Framingham Manufacturing Company, held" &c. It purports that at this meeting a moderator, a clerk, an agent, a treasurer, and a first and a second auditor, were chosen. Under date of December 20, 1813, the person chosen clerk (Samuel Murdock) is stated to have been sworn to perform the duties of clerk; and a vote is recorded, to change the name of the company from "Calvin Sanger & Co." to "The Framingham Manufacturing Company." This book does not contain any record made previously to this meeting, of any act of incorporation, nor of any public notice of the meeting, nor of any division of any corporate property into shares, nor of any by-laws.

June 7, 1814. Samuel Murdock is stated to have been chosen clerk, but there is no record of his having been sworn.

June 6, 1815. At an annual meeting Samuel Murdock is chosen clerk, and sworn the same day.

The annual meetings were held successively until and on the 9th of June, 1823, when it was voted to postpone the choice of officers until another meeting should be called for that purpose. There was no record of any notice to

Digitized by Google

meet to choose officers, but there is an entry, "at a meeting of the Framingham Manufacturing Company, July 17, 1823, all the members being present," Samuel Woodward moderator, voted to choose officers to serve until the second Monday of June next. Calvin Sanger chosen agent; Calvin Sanger chosen treasurer; Samuel Murdock chosen clerk. It is not recorded that Murdock was sworn as clerk.

Then follows a record of a contract to lease the real and personal estate to Samuel Murdock.

The next entry is, "We the subscribers hereby relinquish and resign into the hands of Messrs. Isaac M'Lellan and Joseph Russell all interest and agency in the Framingham Manufacturing Company from the date hereof"; signed Calvin Sanger, Artemas Woodward and Samuel Murdock, and dated November 7, 1823.

The next entry is, "Boston, December 31, 1826. At a meeting of the abovementioned Isaac M'Lellan and Joseph Russell, it is agreed that Joseph Russell shall act as treasurer, and Isaac M'Lellan as clerk, of the Framingham Manufacturing Company; we being the sole proprietors of the stock of said company. Joseph Russell, Isaac M'Lellan."

The next record is a copy of an act of the legislature, passed February 6, 1813, whereby the fourteen persons who were parties to the indenture above mentioned, their successors and assigns, were incorporated as the Framingham Manufacturing Company.

Then follows, "By-laws of the Framingham Manufacturing Company made and passed this 1st day of January, A. D. 1826."

"We the subscribers, Isaac M'Lellan and Joseph Russell, having by purchase become the sole proprietors and acquired an equal interest in the real and personal estate of the Framingham Manufacturing Company &c., as appears by deeds and certificates of transfer of the several members of said corporation who held shares at the time of said purchase and transfer, recorded &c.; also by a certificate in the book of records of the Framingham Manufacturing Company, dated Nov. 7, 1823, signed by Calvin Sanger, Artemas Woodward and Samuel Murdock, who were the proprietors of all the

Digitized by Google

Russell v. M'Lellan.

stock of said company, divided into shares, numbered from one to sixteen, and having made large additions &c.; we the said M'Lellan and Russell do therefore hereby divide the stock of said corporation into forty-eight shares &c., and each stockholder shall receive a certificate of such share or shares as he may hold, signed by the treasurer and witnessed by the clerk" &c. These by-laws are subscribed "Joseph Russell, Isaac M'Lellan."

These by-laws contain a provision, that there shall be an annual meeting on the first Monday of January for the choice of officers.

Nov. 8, 1826. At a meeting held in Boston, M'Lellan was chosen chairman and clerk, and Russell, treasurer. M'Lellan does not appear to have been sworn as clerk.

January 1, 1827. At a meeting this day Isaac P. Osgood was chosen clerk and sworn.

At a meeting on August 3, 1827, the company adopted the *St.* 1826, *c.* 137, relative to manufacturing corporations, and declared a dividend of $ 35 on a share, which was paid by M'Lellan.

No officers appear to have been chosen in 1828.

March 15, 1828. "Resolved to continue the meeting from day to day until the accounts of the company, and those between Isaac M'Lellan and Joseph Russell could be made out and adjusted."

At meetings in January 1829, 1830 and 1831, Osgood appears to have been chosen clerk, but it does not appear that he was sworn.

No entries are made after July 4, 1831.

Neither of the parties to this suit had any interest in the real or personal estate composing the factory and its appurtenances and the machinery belonging thereto, other than what they had in virtue of the transfer of shares to them respectively transferred and recorded in the manner prescribed by law for the transfer of shares in the stock of manufacturing companies.

If the Court should be of opinion that the parties were not partners, joint tenants or tenants in common, within the meaning of the *St.* 1823. *c.* 140. and that the Court had no juris

Digitized by Google

diction in equity, of the matter set forth in the pleadings, the bill was to be dismissed; otherwise &c.

Sullivan, in support of the bill, argued that the plaintiff had no remedy except in a court of equity. There are three classes of corporations; 1. public political corporations, as towns &c.; 2. eleemosynary corporations; and 3. trading or manufacturing corporations, which are in effect mere partnerships in the form of corporations. If a corporation of this nature is dissolved, the property does not go to the public, or to a donor, but to the individuals who belong to the corporation at the time of the dissolution. It may dissolve itself when the corporators please, without a *quo warranto* or asking permission of the legislature. The Court can know nothing of a manufacturing corporation except from its records kept by a sworn clerk. *St.* 1808, *c.* 65, § 1. The persons named in the act of incorporation of February 6, 1813, were never organized as a corporation. There was a meeting of those individuals in June 1813, but it does not appear that they accepted the act, nor that any notice of the meeting had been given. In several instances the person chosen clerk was not sworn, and his entries therefore cannot be regarded as records. The officers chosen in 1823 were to continue in office until the second Monday in June 1824, and as no new officers were chosen at that time, if the corporation were previously in existence, it then expired. Upon the purchase by Russell and M'Lellan in 1823, they became the sole proprietors of the capital stock, either with corporate powers or as partners. It was not contemplated by the legislature that two persons only might constitute a corporation under the general statute (of 1808, *c.* 65) relating to manufacturing corporations. It was intended that there should be such a number of corporators, as that they might vote and show a majority and minority of votes. These parties dealt with each other as partners, for two years, choosing no officers during that period. They could not afterwards re-organize the corporation; they had no authority to call a meeting. If they might do so after the lapse of two years, they might after the lapse of twenty. If then they are not a corporation, they must be regarded as co-partners *Slee* v. *Bloom*, 19 Johns R. 456.

Digitized by Google

Russell v. M'Lellan. April 3d.

S. Hubbard and *Osgood, contrà*, cited Watson on Partn 7; *Pratt* v. *Bacon*, 10 Pick. 123.

PUTNAM J. delivered the opinion of the Court. The question is, whether corporators in a manufacturing corporation are partners, joint tenants or tenants in common, within the meaning of the *St.* 1823, *c.* 140. The same question was considered and determined in the negative, in the case of *Pratt* v. *Bacon*, 10 Pick. 123. We have, after hearing the ingenious argument of the counsel for the plaintiff, revised the former decision, and cannot perceive any fallacy in the reasoning or conclusion. In many things there is a similarity between corporators and partners. Corporators are interested in the profit and loss of the business, and so are partners. But there are such strong and obvious differences between them, as leave no doubt but that the statute does not embrace corporators as co-partners.

One great reason for giving a remedy in equity in the case of partners, was the inadequacy of the legal remedies which existed. But the corporation, the artificial being, may be sued by a corporator, as well as by a stranger. We are not sure however that the legislature took the case of corporators into consideration when they legislated about partners; and if we were at liberty by construction to extend the equitable jurisdiction of this Court to cases which might fall within the reasons, though not within the language of the legislature, it would not be difficult to bring the case at bar within it. We have adopted a different course in former decisions, believing it to be according to the manifest course of legislation, that the equity jurisdiction was intended to be given with great caution. Proceeding upon that principle, we cannot suppose that by partners the legislature intended corporators.

The differences are very obvious. Partners may change the name of the firm when they please; the name of the corporation remains until the legislature, upon the application of the corporators, shall alter it. Suits in favor of or against a partnership, must be carried on in the names of the partners; the corporators are not named in suits for or against the corporation. There is no such joint and several liability between corporators as between partners. The responsibility

Digitized by Google

created by *St* 1808, *c.* 65, subjecting the property of corporators to the payment of the debts of the corporation, is rather an awkward approximation to, than an exact copy of the well known liability of partners. The corporator may transfer his shares at his pleasure, and the purchaser becomes a member; partners cannot introduce new members into the firm, without the consent of all concerned. Corporators have no legal interest in the corporate property. It could not be levied on or taken by execution for the particular debt of the corporator. The real and the personal estate of partners is held by themselves. But we would rather refer to the other differences between corporators and partners which are mentioned in *Pratt* v. *Bacon*, than proceed with any further remarks upon that point.

The act of incorporation has been accepted, and the corporation was properly organized, and it appears that all the dealings which are the subject of enquiry between the parties, were had by them as corporators. The plaintiff may sue the corporation. It may not give him so perfect a remedy as might be devised, but it is the remedy provided by the law, and he must conform to it.

It was argued that the proposal of the defendant to the plaintiff to become jointly interested in this concern, each taking eight shares, made them partners or joint tenants or tenants in common *ipso facto*, upon its adoption. But we cannot perceive that inference; for the corporation continued. The parties did not, by the new arrangement, acquire a legal title to the corporate property. They had indeed joint and equal control over it, but their acts and doings must appear through the proceedings of the corporation in the due forms of the law.

The legal title in the corporation remains, notwithstanding the individual members change. The stock, if every individual member should decease at the same moment, would be distributed according to the statute of distributions or according to the wills of the individuals deceased. The legal representatives of the deceased members would have authority, by law, to manage the corporation, and no dissolution would in such case take place.

Digitized by Google

Russell v. M'Lellan.

It is said that the parties held for two years without doing any corporate act. If it were so, we cannot perceive that they would become partners instead of corporators.

If the shares of the corporation should all centre in one person, and the forms of proceeding or by-laws should prescribe acts to be done by two or more, we do not perceive any difficulty in the sole owner's making sale of shares, so as to conform to the letter of the rule. There is, we think, no evidence of a dissolution of this corporation.

Upon the whole, we are of opinion that these parties are not partners, tenants in common or joint tenants, and that the bill must be dismissed.

James S. Hancock *et al. versus* John Hancock.

A testator who held $20,138 in the three per cent. stock of the United States, made the following bequests: "I give and devise to my daughter M. S., at this time single, $600 per annum, to be regularly paid to her in quarterly payments out of my three per cent. stocks, during her life, and should she marry and have issue, then, at her decease, *the same* to go to her children and the children of B. H. equally." — "All the rest and residue of my estate, I give unto my grandchildren, the children of my daughters, M. S. and B. H., that is to say, to such of them as may be living at my decease, in equal portions." After the death of the testator, a large portion of the stock was paid off by the United States, and the fund in the hands of the executor thus became larger than was sufficient to raise the sum of $600 annually. It was *held*, that the words, *the same*, in the first clause, did not refer to the annuity, but to the stock, and therefore that the stock did not pass by virtue of the latter clause, to the residuary legatees, subject to the annuity; and that it was the intention of the testator, that the stock should remain in the hands of his executor during the life of M. S., and the annuity be paid over to her, and that at her decease, the stock itself should be distributed among all the grandchildren *who should be living at that time.*

This was a bill in equity, brought by James S. and Thomas Hancock against John Hancock, the executor of the will of James Scott, Mary Butler, a widow, and George Hancock and others, children of John and Betsy Hancock.

The bill alleges, that on April 12, 1809, James Scott, of Boston, made his will, which contained the following clauses:

"Secondly, I give and devise to my daughter Mary Scott, at this time single, six hundred dollars per annum, to be

Digitized by Google

regularly paid to her in quarterly payments out of my three per cent. stocks, during her life, and should she marry and have issue, then, at her decease, the same to go to her children and the children of Betsy Hancock equally."

"Eighthly, all the rest and residue of my estate, I give unto my grandchildren, the children of my daughters Mary and Betsy, that is to say, to such of them as may be living at my decease, in equal portions, and be their number more or less."

The bill further alleges, that James Scott died before June 26, 1809, on which day his will was duly approved and allowed; that John Hancock, who was appointed one of the executors by the will, was admitted sole executor; that Mary Scott, now Mary Butler, is alive and has, since the making of the will, intermarried with Merrill Butler, now deceased, and that she has no issue; that Betsy Hancock had issue, four children, at the time of the death of the testator, viz. James and Thomas Hancock, the complainants, and George and John Hancock junior, two of the respondents, and that they are the sole residuary legatees under the will; but that since his death she has had issue, Charles L., William E., Elizabeth L., Mary L., Franklin and Washington Hancock, who were also respondents in this suit; that, at the time of his death, James Scott held the sum of $20,000, in the three per cent. stock of the United States, and that the income of the same, being $600 per annum, was received by John Hancock, the executor, or by Mary Butler under a power of attorney from him, until October 1, 1832, on which day two thirds of the sum of $20,000, being $13,333·33, was paid over to the executor by the United States; that the complainants have been informed, that this sum has been invested by the executor in bank stock and promissory notes with security; and that the remainder of the sum of $20,000, being $6,666·66, will soon be paid over to the executor; that the whole sum of $20,000 is much more than sufficient to produce and to secure to Mary Butler the income of $600; that the complainants are advised that, according to the tenor of the will, a sum sufficient to secure the payment of the annuity of $600 ought to be invested by the executor, for that purpose. and that the remainder of the

Digitized by Google

Hancock v. Hancock.

fund of $20,000 ought to be paid over by him to the residuary legatees, James S., Thomas, George and John Hancock junior, who are, by virtue of the will, entitled each to one fourth part of such residue; that even if said principal sum ought not to be so distributed, nevertheless that all the income and profits thereof exceeding the sum of $600, ought to be divided among the residuary legatees, as fast as the same may accrue; and that the other children of Betsy Hancock were not born until after the decease of the testator, and are therefore not entitled to any part thereof.

The complainants, therefore, pray that an account may be taken of all stocks, sums of money, notes and other securities belonging to the trust fund, and of the interest and income thereof; that the executor may be ordered to secure the payment of the annuity to Mary Butler, by the investment of such portion of the fund as may be sufficient for that purpose; and that one fourth part of the remainder of the fund may be paid to each of the complainants. Or, if the Court should be of opinion that the distribution of the fund should be postponed to any future day, then the complainants pray that the annuity of $600 may be paid to Mary Butler, and that one fourth part of the remainder of the interest and income of the fund, may be paid to each of the complainants. The complainants also pray for relief generally.

The answer of John Hancock, the executor, avers that the testator died on June 19, 1809, and that Charles L. Hancock, one of the respondents, was born on March 6, then next following; and it submits to the judgment of the Court, whether Charles L. Hancock was or was not living at the decease of the testator, whether James S., Thomas, George and John Hancock junior are the sole residuary legatees, and whether the surplus of the fund of $20,000, if the same forms any part of the residuary estate, after investing so much thereof as shall be sufficient to produce and secure the annuity, ought to be now distributed to the residuary legatees. It is also alleged, that a large amount of personal property has been distributed among the four residuary legatees, James S., Thomas, George and John Hancock junior.

The answer of Charles L. Hancock denies that James S.,

Digitized by Google

Thomas, George and John Hancock junior were the only issue of Betsy Hancock living at the decease of the testator; avers that he, the respondent, was living at that time, and that he is entitled equally with them to all the real and personal estate of the testator not otherwise disposed of in the will; and refers it to the judgment of the Court, whether the surplus of the fund of $20,000, if the same forms a part of the residuary estate, ought to be now distributed to the residuary legatees including the respondent, averring that he is ready and willing to receive his just proportion thereof.

In the answer of Mary Butler it is averred, that she agrees, that so much of the fund of $20,000 as shall remain after fully securing the payment of the annuity, shall be paid to the complainants, according to the prayer of their bill, and that she is willing to come to some equitable agreement with respect to the same, in such manner as the Court shall direct.

The joint and several answer of William E. Hancock, Elizabeth L., Mary L., Franklin and Washington Hancock avers that they are infants under the age of twenty-one years; that they are advised, that if any such bequests as set forth in the bill were made by the testator, the sum of $20,000 three per cent. stocks is by the tenor and effect of the will bequeathed equally to all the children of Betsy Hancock, after the death of Mary Butler without issue, and that the same is no part of the residuary estate of the testator; and prays that their rights in the premises may be respected.

It was admitted, at the argument, that at the time of his decease, James Scott held the sum of $20,138·61, in the three per cent. stock of the United States.

J. G. Rogers for the complainants. The three per cent. stock was not specifically devised, but only charged with the annuity, and therefore constitutes a part of the general residue. The annuity thus becomes a charge on the general residue. *Oakes* v. *Heath*, 1 Ves. sen. 141. If this was not a specific legacy, then, as the whole stock forms a larger fund than is necessary for the purpose of raising the annuity, a sufficient portion of it may be set apart to effect this object, and the remainder be distributed among the residuary legatees. *Ellis* v. *Walker*, Ambl. 309; *Simmons* v. *Vallance*, 4 Bro. C. C. *March 21st.*

Digitized by Google

Hancock v. Hancock.

345 ; 2 Wms. on Executors, 742 ; *Humphreys* v. *Humphreys*, 2 Coxe, 184 ; *Bronsdon* v. *Winter*, Ambl. 57 ; *Kirby* v. *Potter*, 4 Ves. 748 ; *Deane* v. *Test*, 9 Ves. 152 ; *Dimes* v *Scott*, 4 Russel., 195 ; *Ashburner* v. *Maguire*, 2 Bro. C. C. 108. If the fund should prove insufficient for raising the annuity, then the deficiency must be made up. *Savile* v. *Blacket*, 1 P. Wms. 778 ; *Attorney General* v. *Parkin*, Ambl. 566 ; *Davies* v. *Wattier*, 1 Sim. & Stu. 463 ; *May* v. *Bennett*, 1 Russell, 370 ; *Wilson* v. *Brownsmith*, 9 Ves. 180 ; *Purse* v. *Snaplin*, 1 Atk. 414.

A legacy of stock is held to be only a direction to buy such stock, if the testator does not own any. *Bishop of Peterborough* v. *Mortlock*, 1 Bro. C. C. 565. So, the words *to be paid out* of a fund, are held merely to *indicate* the fund from which the payment is to be made. *Kirby* v. *Potter*, 4 Ves. 748 ; *Deane* v. *Test*, 9 Ves. 152.

In the present case "the same" refers to the annuity, and not to the stock.

F. Dexter for the respondents.

April 3d.

Shaw C. J. delivered the opinion of the Court. The principal question in this case is upon the construction of the provisions of the will of James Scott. The claim of the plaintiff proceeds upon the assumption, that by force of this will the three per cent. stock was not itself bequeathed by the second clause in the will, but that, subject to the annuity of $600 per annum charged upon it, it passed by force of the eighth clause, to the residuary legatees ; and therefore, if it is more than sufficient, in consequence of circumstances which have since occurred, to raise the sum of $600 annually, the plaintiffs, as such residuary legatees, are entitled to distribution of the surplus. But the Court are all of opinion, that this would be an unnatural and forced construction. The invariable rule in the interpreting of wills is, to ascertain the meaning and intent of the testator ; in doing which recourse is to be had to every clause and word in the will, and the condition and circumstances of the testator's estate, to which the will applies, and to which the testator must have had reference.

Construed in reference to these considerations, we are of

Digitized by Google

opinion, that it was the intention of the testator to give to his unmarried daughter an annuity of $600, payable from the income of his three per cents, and at her decease, to give the same, that is, the same three per cents, equally among the children of both families, that is, equally among all his grandchildren. Any other construction would involve the extraordinary conclusion, that the testator intended to create an annuity chargeable on this stock, not for the life of his daughter only, but in perpetuity, and that the stock itself should never be distributed nor his estate settled; and that after the death of his daughter, the same $600 annually was to go to his grandchildren, however numerous, and that forever. But the stock itself, at three per cent., would yield a trifling fraction over $600 annually, so small that it cannot be supposed to have been considered of any importance by the testator.; then, upon the construction which we adopt, the stock was to remain in the hands of his executors, during the life of his daughter, and the income to be paid over to her, and at her decease, the stock to be distributed equally among all his grandchildren then living. This seems to us also to be the most obvious grammatical construction of the language used. The words "the same," may refer to the $600 per annum or to the three per cents, but the most obvious reference is to the last antecedent. By a necessary implication, the stock was to remain during the life of his daughter, and is no otherwise disposed of in the will, than by the clause in question, or the residuary clause.

Further, the words are, "*the same* to go to her children and the children of Betsy Hancock equally." To give a sum of money or stock, upon the happening of a future event, uncertain as to the time it may happen, to a class of persons described, to be equally divided, is natural and usual; but to create an annuity, chargeable upon personal property, and give it to one for life, and then to give that annuity to a class of persons, to be equally divided among them, would be improbable and out of the usual course of such bequests. From all the views we have taken of the terms of the will and the circumstances of the testator's estate and family, we are of opinion, that it was his intention to set apart the three per cents during the life of his daughter, to raise her annuity out of it,

Digitized by Google

Hancock v. Hancock.

and then to give that amount of stock to be equally divided among his grandchildren.

The consequence is, that the vesting of this bequest, is suspended during the life of the annuitant, and then it will go, not to the complainants exclusively, as residuary legatees, but to all the grandchildren.

Bill dismissed.

COMMONWEALTH *versus* NATHAN LANG.

On an indictment for selling a lottery ticket, in which it was alleged that the sale was made to H and L, it appeared, that in pursuance of a previous agreement between them to go shares in a lottery ticket, H, in the presence of L, selected the ticket from among a number produced by the defendant at the suggestion of H; that H and L paid their respective shares of the price, L laying his money down on the counter; that H kept the ticket, with the consent of L, till the drawing of the lottery, when, the ticket having drawn a prize of $2000, the money so drawn was paid by the defendant to H, who paid over to L his share; and that there had been no communication between H and L on the subject of the ticket from the time of the purchase till they were informed that the ticket had drawn a prize and they received the money. It was *held*, that this evidence proved a *joint sale* of the ticket to H and L according to the allegation in the indictment; and that it was immaterial, whether the identical money advanced by each purchaser, for the ticket, was paid to the defendant, or was received by one, and the payment for the ticket made from his funds.

THIS was an appeal from the Municipal Court, on an indictment against the defendant for selling lottery tickets There were two counts in the indictment. In the first count he is charged with having, on May 15, 1832, sold the quarter of a lottery ticket to Enoch Hawes and Thomas Lawrence. The second count charges the defendant with having offered for sale the quarter of a lottery ticket.

At the trial, before *Shaw* C. J., it appeared from the testimony of Hawes, that on or about the day alleged in the indictment, Hawes was at work, with Lawrence, in a victualling cellar in Boston; that the defendant came in; that Hawes asked Lawrence if he would go halves with him if he bought a lottery ticket; that Lawrence said he would; that the defendant having produced some tickets, Hawes selected one, and Lawrence agreed to go halves with him in that ticket,

Digitized by Google

that Hawes paid $1.12½, and Lawrence, an equal sum, which together made up the price of the ticket; that Lawrence put his money on the counter; but the witness could not say, whether he put his also on the counter, and the defendant took up the money of both, or whether the defendant took up any of the money, or whether he (the witness) gave his part of the money to the defendant; that he kept the ticket with the consent of Lawrence, till the lottery was drawn; that a day or two after the purchase, the defendant informed them that the ticket had drawn a prize of $2000; and that they then went with the defendant to one Carter's, where the money drawn as a prize was paid for the ticket.

Lawrence testified, that the defendant produced the ticket upon Hawes's having said something to him about tickets; that Hawes went out, and that while he was absent, he (Lawrence) examined the tickets and selected one, and remarked, at the same time, that "if he was going to purchase a ticket, he should select that one;" that Hawes came in, a few minutes after, and seeing the ticket which he had selected, rejected it and selected another; that the witness paid down his half of the price of the ticket and went about his business; that the witness considered himself as purchasing one half of the ticket of Hawes, and not of the defendant, and that he did not consider himself as having any thing to do with the defendant in the purchase of the ticket; that the money drawn as a prize was paid by Carter to the defendant, and by the defendant to Hawes, who paid over to the witness his share.

There was no evidence of any communication between Hawes and Lawrence on the subject of the ticket, from the time it was delivered by the defendant to the time when he informed them it had drawn a prize.

The jury were instructed, that it was necessary, in order to support the first count, to prove a joint sale to Hawes and Lawrence, and that it would not be sufficient to prove a sale of the ticket to one, though he immediately afterwards sold one half of it to the other; that if there was a previous agreement between Hawes and Lawrence to go shares equally in a ticket to be bought, and Hawes bought the ticket in pursuance of that agreement, then it was a joint sale to the two, and

Digitized by Google

Common-wealth v. Lang.

was in the nature of a partnership in the particular transaction, so that a purchase by one, and a delivery to one, would vest an interest in both.

The jury found the defendant guilty on the first count, and not guilty on the second.

The defendant moved for a new trial, on the ground of misdirection.

If the Court should be of opinion, that the directions to the jury were wrong, the verdict was to be set aside and a new trial granted; otherwise, judgment was to be rendered on the verdict.

March 30th. *Ward* for the defendant. We contend, that the evidence proves that this was not a joint sale, but a sale to Hawes and a sub-sale by him to Lawrence; the first sale was an executed, the second, an executory contract. 1 Com. on Contr. 298; *Coope* v. *Eyre*, 1 H. Bl. 37; *Hoare* v. *Dawes*, Dougl. 371. At auction sales, where several persons are each desirous of purchasing a portion of the goods offered for sale, it is often agreed, that one shall bid off the whole, and that the others shall take of him; now it would be extremely inconvenient, if such a purchase should be held to be joint, thus making those liable for the price, who were not secured by the possession of the property.

If the defendant was ignorant of any connexion between Hawes and Lawrence in the purchase, this fact would have a material effect in determining whether the purchase was joint or not; *Young* v. *Hunter*, 4 Taunt. 581; and this point should have been presented to the jury for their decision.

The jury were misled by the instruction, that this transaction was in the nature of a partnership between Hawes and Lawrence. This instruction should have been qualified. A partnership is very different from a joint purchase; if there was a partnership between them, it would be immaterial whether both partners were present at the purchase or not. The purchasers were tenants in common, and not partners; each could have sold his share, and no more.

The testimony of Lawrence as to his understanding of the contract, will prevail over any implication of law as to its nature; and the jury should have been so instructed.

Digitized by Google

Commonwealth v. Lang

April 3d.

Austin (Attorney-General), for the commonwealth, cited *Everett* v. *Tindall*, 5 Esp. 169; *Brembridge* v. *Campbell*, 5 Carr. & P. 186.

MORTON J. delivered the opinion of the Court. The indictment alleges, that the defendant *sold* a part of a ticket to Hawes and Lawrence. To maintain this allegation, it is necessary to prove a *joint* sale to both; and a *sale to one*, even if the other became afterwards interested in it, is not sufficient. The defendant is only answerable for his own direct acts, and cannot be affected by any others after the sale.

Was the original sale to Hawes and Lawrence, or to Hawes alone? Did the property immediately vest in both, or was some subsequent act necessary to give Lawrence an interest in the ticket?

That Lawrence became the owner of part of the ticket, is proved by the fact, that he received a part of the prize drawn by it, and is not disputed. The report expressly states, that there was no communication between Hawes and Lawrence after the delivery to Hawes and before the drawing of the prize and the receipt of the money. There was no subsequent contract. Lawrence's interest in the ticket, therefore, must have vested by the original sale. But it is not necessary to rely upon this summary argument. A further examination of the case will bring us to the same result. Hawes and Lawrence agreed before the purchase, to make it. Each furnished his proportion of the money to pay for it. The ticket was actually paid for by both, and it is wholly immaterial whether the *identical* money advanced by each was paid to the defendant, or was received by one and the payment made from his own funds.

Indeed, if several of these ingredients were wanting, it still would be a *joint sale*. If Lawrence had advanced no money, and even if he had not been present, still the purchase in pursuance of a previous agreement, would have been a *joint act* and have vested the property in both, leaving the one a debtor to the other for his share of the purchase money. It so far partook of the nature of a partnership, that one might act for both, might make the contract for the purchase, might receive the delivery, and, had it been on credit, might have bound both by his contract, express or implied, for the consideration.

Digitized by Google

Common-wealth v. Lang.

The payment was clearly a *joint* act, whether the identical money was used for the purpose, or some other substituted. And the seller's knowledge or ignorance of the *previous agreement* cannot change the nature of the transfer. He having received payment, it is immaterial to him whether the sale was made to *one* or *two*; and it did not in the slightest degree affect the criminality of the act. The property immediately vested in both. It was in law a *joint sale*. And it was proper and necessary so to describe it in the indictment.

This view is supported by general principles, is perfectly consistent with all the cases, and clearly within *Everett* v. *Tindall*, 5 Esp. 169. The only case having the least appearance of supporting a contrary doctrine is that of *Young* v. *Hunter*, 4 Taunt. 581. But in the case at bar, the principal element of that judgment is wanting. There is no sub-sale. The original agreement was for a *joint* purchase, and there is no reason to suppose that *one* was to purchase the *whole*, and the *other* afterwards to purchase a part of him.

On the whole, we think the instructions were clearly right and that the motion for a new trial must be overruled

Digitized by Google

JOHN STONE *versus* GEORGE A. HODGES *et al.* and Trustees.

A contract was made between K and H, for the joint purchase of 20,000 Russia mats, which were to be stored by H. Afterwards, on May 6, 1829, a new contract was entered into by the parties, which was as follows: "K bought of H 20,000 Russia mats, at 10 cents each, $2,000. It is understood K is to pay $4 per month, storage for the above mats, from this date, and interest on the mats until paid for; and the said K is not to pay for said mats more than the amount indorsed on this bill, till the same are sold." On the back of this contract was an indorsement by H, of the same date, acknowledging the receipt of $1104·50 in cash and notes. On May 8, 1829, H caused the mats which had not been so paid for, to be attached on a writ in favor of one of his creditors. On May 13, 1829, K was summoned as the trustee of H, at the suit of W. On June 5, 1829, K brought an action of trespass against the sheriff for attaching the mats and recovered judgment for the value of the mats so attached. In a process of foreign attachment in which K was summoned as trustee of H, immediately after the amount of this judgment had been paid over to K, it was *held*, that the property in the mats vested in K, upon the sale to him on May 6, 1829; that the attachment of the mats, being a tortious act, in no respect affected such sale; and therefore that K was chargeable as the trustee of H, when he was summoned at the suit of W, for the residue of the mats not paid for by him at that time.

By the answers of the supposed trustees, the following facts appeared. On November 5, 1828, a contract was made between the defendants George A. Hodges and Gardner Wheelwright, who were partners, of the one part, and Kittredge and his partner, Wyman, two of the supposed trustees, of the other part, for the joint purchase from Hodges, of 20,000 Russia mats, at ten cents each, on six months' credit; and it was agreed, that Hodges should store the mats six months free of expense; that as fast as the mats should be sold, the proceeds should be paid to Hodges, who was to allow interest for the same until the six months' credit expired; and that the expense of delivering the mats should be paid by the parties, as interested.

On May 6, 1829, a new contract was entered into by the parties, in relation to the mats, which was in the following words; "Boston, May 6, 1829. Messrs. Kittredge & Wyman bought of George A. Hodges & Co. 20,000 Russia mats at 10 cents each, $2,000. Received payment. It is understood Kittredge & Wyman are to pay four dollars per month,

Digitized by Google

Stone v. Hodges.

storage for the above mats, from this date, and interest on the mats until paid for; and the said Kittredge & Wyman are not to pay for said mats more than the amount indorsed on this bill, till the same are sold."

On the back of this last contract was an indorsement by the defendants, of the same date, acknowledging the receipt of $1104·50, consisting of $324·50, in cash, and of the promissory notes of Kittredge & Wyman, for $780.

None of the mats were removed by Kittredge & Wyman from the store of the defendants, between May 6, and May 8, 1829, on which last day the mats then in the store, amounting in number to 17,000 or 18,000, were attached by Baldwin, a deputy sheriff, on a writ against the defendants in favor of one of their creditors. Soon after the attachment, Baldwin relinquished to Kittredge & Wyman a portion of the mats, but continued to hold the residue of them, 8474 in number, by virtue of his attachment. The mats delivered to Kittredge & Wyman before May 6, 1829, together with those so relinquished by Baldwin, constituted the amount paid for by them as specified in the indorsement on the contract of May 6, 1829.

On May 13, 1829, Kittredge and Wyman were summoned as the trustees of the defendants, at the suit of Stephen White; which action was pending in the Court of Common Pleas at the time when these answers were filed; but it was admitted, that they had subsequently been adjudged trustees in such action.

On June 5, 1829, Kittredge and Wyman commenced an action of trespass against the sheriff, for the attaching and carrying away of the 8474 mats, by his deputy Baldwin; at the trial of which action, Wheelwright testified, that his partner, Hodges, procured the writ and caused the attachment which was the ground of the action against the sheriff, to be made. Final judgment was rendered against the sheriff, at the March term 1831, of this Court, for the sum of $939·15, damages, being the value of the mats and interest, together with costs.

In regard to this action, Kittredge, in his disclosure, stated that they considered the mats to be their property and to be worth more than ten cents each; and that if he had supposed

Digitized by Google

that the mats were not worth more than ten cents, each, and that they were not liable to pay for them, to the defendants or any other person, he should not have brought the action.

On April 13, 1831, the execution issued upon this judgment was satisfied, and the amount was paid to Henry H. Fuller Esq., the attorney of Kittredge and Wyman, who was summoned as a trustee in the present action. On April 30, 1831, after notice of such payment had been given to them by Mr. Fuller, but before the money had been paid over to them, they were summoned as trustees at the suit of the present plaintiff.

The respondents, Kittredge and Wyman, prayed, that in case the Court should be of opinion, that they were chargeable as trustees in the present suit, they might be allowed to deduct from the amount recovered by way of damages in their action against the sheriff their expenses and the charges of their attorney in prosecuting that action to final judgment.

March 27, 1832.

J. Pickering and *Bassett* for the plaintiff. The respondents, Kittredge and Wyman, were not chargeable as trustees of the defendants on account of the mats which had not been paid for by them, when they were summoned at the suit of White. The contract of May 6, 1829, which rescinded that of November 5, 1828, was not a mere bill of sale, but an executory contract, and the property in the mats did not pass to Kittredge and Wyman at all, or only *sub modo*; the mats were not to be paid for by them, till they were sold, and this was a contingency which might never happen. Bac. Abr. *Customs of London*, *H.* There was therefore no determinate debt, *debitum in præsenti*, due from Kittredge and Wyman to the defendants, at that time.

If the respondents were indebted absolutely to the defendants, they could not deduct the expenses of the suit against the sheriff, from such debt; and their prayer to be allowed such a deduction shows their construction of the contract.

Further, the respondents were not at that time chargeable as trustees, as they had only a constructive possession of the mats. *Andrews* v. *Ludlow and Trs.*, 5 Pick. 28. The agreement by them to pay the storage is no evidence of a

Digitized by Google

Stone v. Hodges.

delivery to them, nor an *indicium* of ownership. *Bailey* v *Ogden*, 3 Johns. R. 399; *White* v. *Wilks*, 5 Taunt. 176.

The defendants had a lien on the mats, as the vendors, and the respondents would not be chargeable as trustees at the suit of White, until there had been a delivery of the mats to them.

Hodges rescinded the contract of May 6, 1829, by causing the mats to be attached, and at the time when Kittredge and Wyman were summoned as trustees by White, they had not elected, by bringing the action against the sheriff, to adhere to the contract or to annul it. It would be dangerous to allow trustees, in this way, to decide whether they would become chargeable or not.

In order to charge a trustee, there must be a right of action against him, in favor of the principal; *Chealy* v. *Brewer*, 7 Mass. R. 259; but in this case, if the defendants had sued Kittredge and Wyman upon their contract, the attachment of the mats through the agency of Hodges, would have been a good defence; the respondents were under no obligation to pursue the property in the hands of the sheriff. Brown on Sales, 343.

The respondents did not, therefore, become liable as the trustees of the defendants till the amount of the judgment recovered in the action against the sheriff was paid to their attorney in that suit.

Morey, for the trustees, cited to the point of the contingency of the debt, *Thorndike* v. *De Wolf*, 6 Pick. 122; to the point, that the respondents were protected by the judgment in the trustee process sued out by White, 1 Big. Dig. *Trustee Process*, *E*.

April 8th, 1833.

WILDE J. delivered the opinion of the Court. Upon the facts disclosed by the trustees, we are of opinion, that they are not liable in this suit.

It appears by the disclosure, that before this writ was served upon them, they had been summoned as the trustees of the principal defendants, in a suit against them in favor of Stephen White, and it is admitted that they have been since adjudged trustees in that action. It is not contended, that any surplus remains in the hands of the trustees after satisfying White

Digitized by Google

demand; but it has been urged by the plaintiff's counsel, that at the time of the service of White's writ, the trustees were not indebted for the mats purchased, because they were not to be paid for until they should be sold by the trustees. That this limitation of the time of payment merely would not discharge the trustees, seems to us very clear. The mats had been sold at an agreed price, part of which had been paid, and the trustees were indebted for the residue. It was a demand *debitum in præsenti*, and rendered the trustees liable.

The plaintiff's counsel have also argued, that the trustees were not liable in the former suit, as they had only a constructive possession of the mats, and as the mats had been attached and taken by one of the creditors of Hodges and Wheelwright, as their property, the trustees might rescind the contract.

As to the possession of the mats, it is quite immaterial whether it was constructive or actual; the sale was complete, and the property in the mats was vested in the trustees. If they had held the mats in trust, and had been charged on that account, the distinction between actual and constructive possession, as laid down in the case of *Andrews* v. *Ludlow and Trs.*, 5 Pick. 28, might be applicable. But the trustees were charged in the former suit for the price, and could not, by law, be charged on any other ground.

As to the supposed rescinding of the contract, it is clear that the attaching of the mats, as the property of Hodges and Wheelwright, could have no such effect. The taking by the sheriff under that attachment, was a tortious act, and the trustees recovered against him in an action of trespass. *Kittredge* v. *Sumner*, 11 Pick. 50. This, therefore, could in no respect affect the sale.

Trustees discharged.

Digitized by Google

Ex Parte Richard Dick.

a order to subject a convict to additional punishment, under *St.* 1817, *c.* 176, § 5, 6 (since repealed,) it was sufficient that the crime for which he was about to be sentenced was one punishable by confinement to hard labor for a term of years, but in regard to a former conviction, it must have been one upon which he was actually sentenced for a term of years, that is, a period not less than two years.

Writ of certiorari.

June 21st. Shaw C. J. delivered the opinion of the Court. The object of this process is to revise the judgment of this Court, at the term in Middlesex, 1819, whereby Richard Dick was sentenced to the State prison, for life, upon an information filed by the Attorney General, to have an additional penalty awarded, as upon a third conviction, pursuant to the provisions of *St.* 1817, *c.* 176, § 6. It appears by the judgment on that information, that the respondent, on being called upon to plead, admitted the truth of the facts set forth in the information, that is, in effect pleaded guilty, and judgment appears to have been entered as of course, without any defence being made, or the question of law considered. If, therefore, according to the true construction of the statute, the convict was not liable upon the case stated in the information, to such additional punishment, it is now within the jurisdiction of the Court to inquire into the regularity of this judgment, and under the circumstances, if found erroneous, it ought to be reversed.

It appears by the record, that Dick was first convicted at the Municipal Court, February 1814, for a larceny, upon which he was sentenced to five days' solitary imprisonment, and confinement to hard labor for the term of one year.

The second conviction was had at the Municipal Court, July 1817, for larceny, on which he was in like manner sentenced to five days' solitary imprisonment, and one year to hard labor.

The third conviction was also at the Municipal Court, April 1819, for an aggravated larceny, upon which he was sentenced to twenty days' solitary imprisonment, and to hard labor for the term of four years.

The Court are therefore now called upon to determine, whether the two prior convictions were such, as to subject the

Digitized by Google

convict, on his third conviction, to the additional punishment under the statute of 1817.

This statute, § 5, provides, that whenever any person who shall be convicted of any crime, the punishment whereof shall be, by law, confinement to hard labor for any term of years, shall have been before sentenced to a like punishment, by any court of this or any other of the United States, he shall be sentenced to solitary imprisonment not exceeding thirty days, and confinement to hard labor not exceeding seven years, in addition, &c., and in case such convict shall have been before twice convicted and sentenced in manner aforesaid, he shall be punished by confinement to hard labor for life. Then, after a preamble reciting, that it may be often unknown to the prosecuting officer and the grand jury, at the time of an indictment found, that the accused has been so convicted before, and the additional punishment cannot be then awarded, to prevent the convict from escaping from this penalty, it goes on to provide, that upon the representation of the warden or any director of the State prison, the attorney or solicitor general shall file an information before the Supreme Judicial Court, under which the additional sentence may be awarded. This jurisdiction was afterwards transferred to the Municipal Court.

It is manifest that the primary intention of the statute was to award the additional punishment as a punishment for the second or third offence respectively, considering such second or third offence as a more aggravated crime, and deserving of severer punishment, on account of the character of the accused, as a convicted offender; that such punishment is to be awarded as the punishment of that single offence, by the court before whom such conviction is had, and it is only when it is not known, and cannot be brought to the judicial notice of that court, that a subsequent and distinct process by information is to be had. The court before which such proceeding by information is had, will therefore adopt precisely the same rule, and pronounce the same judgment, which the court would have done, before whom the third conviction was had, in case the two prior convictions had been stated in the indictment and found by the verdict, so as to stand as part of the record, upon which that court was called on to pronounce its judgment.

Digitized by Google

Ex parte Dick.

The question is then, whether the two first convictions and sentences, in the case before us, were those contemplated by the statute, so that this convict, when called up to be sentenced for a crime, the punishment whereof is confinement to hard labor for a term of years, ought to be sentenced for life. This depends upon the construction of the terms, "sentenced to a like punishment." In the case of *Seymour*, decided at the present term, (ante, *p.* 40,) we gave our reasons for the opinion, that the designation of crimes as punishable by hard labor for a term of years, was intended to describe the more aggravated crimes, in contradistinction from minor offences punishable by shorter terms of confinement to hard labor. But in estimating the character of crimes, as to aggravation, there is a manifest difference between the case of the offence, upon which the party stands convicted, and upon which sentence is now to be passed, and the case of former convictions, upon which sentence has been passed. Before sentence, the criminal nature and character of the offence is to be judged by the degree of punishment which the law denounces against it; but after sentence, the criminality of the party will be estimated by the degree of punishment actually inflicted. We think therefore, to bring the case within the statute, it is sufficient that the crime, upon which the party is to be sentenced, is one punishable by confinement for a term of years; but that in regard to the former convictions, they must be those, upon which the party was actually sentenced for a term of years. There is a vast latitude in the degree both of guilt and of punishment, in respect to crimes coming under the same denomination, and punishable by the same provision of law. Take the case of felonious assault, for instance, which, in point of guilt, may vary, from an almost venial act, and one which some would even regard as meritorious, to an act, the perpetrator of which is saved by mere accident only, from the guilt of an atrocious murder. The punishment in like manner varies from confinement to hard labor, for the shortest possible time, to twenty years, at the discretion of the court. *St.* 1818, *c.* 124. It would be unreasonable to suppose that the law, after sentence, meant to treat all cases alike in point of aggra-

Digitized by Google

vation, where courts, entrusted with great latitude of discretion, for the very purpose of adapting the degree of punishment to the degree of criminality, have, upon all the circumstances of each case as disclosed on trial, varied in those punishments, from twenty days to twenty years. It appears to us that the law meant to avail itself of this obvious distinction; in regard to the crime upon which no sentence has been yet pronounced, it is to be estimated by the length of time, for which it is by law punishable, but in regard to the actual guilt of the offender, in a particular case upon which he has been tried and punished, it may be best measured by the sentence of a competent court, having all the facts of his case before it, and bound to exercise its judgment with special reference to those facts.

And we think the literal construction of the statute leads to the same result. It was argued that the words "sentenced to a like punishment" merely meant punishment of like kind, punishment by confinement to hard labor. But we think this wholly inadmissible. Time enters most essentially into the nature and degree of the punishment, and constitutes its distinguishing character, so far as it is expressive of the degree of aggravation. We think then, that "sentenced to a like punishment," is equivalent to "sentenced to hard labor for a term of years." This construction is strengthened, if not rendered entirely conclusive, by a provision in the ensuing section. It refers to the case, where the prior conviction was not known at the time of the third conviction, and provides for the process by information, whenever it shall appear that any convict shall have been before "*sentenced* to confinement to hard labor, for term of life or years." The cases for additional punishment are precisely the same, in the two cases, the mode of proceeding only is different. This then seems quite conclusive, not only that the party must before have been sentenced to hard labor, and must have been sentenced upon an offence punishable by hard labor for a term of years, but that he must have been in fact sentenced for a term of years.

As to what is a term of years within the meaning of this statute, it was decided in the case *Ex parte Seymour*, at the

Digitized by Google

Ex parte Dick.

early part of the present term, that it is a period no less than two years.*

As it appears by the record, that upon his two first convictions, the prisoner Richard Dick was sentenced to confinement at hard labor, in each instance, for one year only, we think, for the reasons stated, that he was not liable to the additional punishment, that the judgment of this Court in Middlesex, at the November term thereof, 1819, against Dick upon the information filed by the attorney-general, is erroneous, and the same is reversed.

Leland, for the prisoner.

Austin, Attorney-General, for the commonwealth.

Subsequently the prisoner was brought up by *habeas corpus* and discharged.

Ex Parte George White.

A sentence as a common and notorious thief, pursuant to *St.* 1804, *c.* 143, § 3, although it may have been upon three simple larcenies neither of which separately would be punishable by hard labor for a longer term than one year, is a sentence for an offence punishable by confinement to hard labor for a term of years, within the meaning of *St.* 1827, *c.* 118, § 19, 20, subjecting the convict to additional punishment in certain cases.

June 21st

Shaw C. J. delivered the opinion of the Court. Upon a writ of certiorari to the Municipal Court, a record is returned, by which it appears, that at the May term of that court 1831, George White was sentenced to confinement at hard labor in the State prison for life, upon an information there filed by the attorney of the commonwealth, pursuant to *St.* 1827, *c.* 118, § 20, by which the jurisdiction in this class

* The law in this respect is now altered, and the offence upon the conviction of which, the additional punishment is to be awarded, must be one, punishable by confinement to hard labor in the State prison for one year or more, and the convict must be one who has been sentenced to a like punishment for a period of not less than one year. *St.* 1833, *c.* 85 § 1; Rev. Stat. 809, *Act of Amendment*, § 16, 34.

Digitized by Google

of cases was transferred to the Municipal Court. The same question arises in this as in several other cases of convicts before the Court at the present term, namely, whether upon the several convictions against White, he was liable to be sentenced as upon a third conviction, to confinement to hard labor for life.

It appears by the record, that at Taunton, in 1803, he was convicted of two several aggravated offences, upon each of which, among other punishments, he was sentenced to confinement at hard labor, for the term of five years.

It further appears, that at Greenfield, in 1817, before the Supreme Judicial Court, he was convicted on three separate larcenies, and punished, as a common and notorious thief, pursuant to *St.* 1804, *c.* 143, § 3, by confinement to hard labor for the term of ten years.

The last conviction, and that upon which it is contended, that the additional punishment of confinement to hard labor for life ought to have been awarded, if a knowledge of the prior convictions had then been before the court, was had at Plymouth, in May 1830, upon which White was convicted of stealing a horse of the value of one hundred dollars, and was sentenced to two days solitary imprisonment, and confinement to hard labor for one year.

One of the questions raised is, whether being sentenced as a common and notorious thief, as the prisoner was at Greenfield, and which may have been upon three simple larcenies, neither of which separately would be punishable by hard labor, for a longer term than one year, is being convicted and sentenced for an offence punishable by confinement to hard labor for a term of years, within the meaning of the statute, so as to subject the party to the additional punishment. Upon this point the Court are of opinion, that such a conviction and sentence of one as a notorious thief, is a conviction and sentence within the meaning of the statute.

By simple larceny is understood the larceny punished by the first section of *St.* 1804, *c.* 143, where there is no aggravation, such as breaking a house or shop, or stealing from the person, and where the value of the goods stolen does not exceed the sum of $100. By the same statute it is pro-

Digitized by Google

Ex parte White.

vided, that if any person shall be convicted at the same time of three distinct larcenies, he shall be punished as a common and notorious thief, by confinement to hard labor for a term not less than three years, nor more than fifteen years. The question is, whether such a conviction and punishment is a conviction for an offence, the punishment whereof is, by law, confinement to hard labor for a term of years; and we think it is. The effect of the statute is, to consolidate the three, so as to make one aggravated crime, that of being a notorious thief, punishable by one sentence, and that going much beyond the aggregate of the three punishments, if imposed severally. We think we should violate the plain intent of the statute in adopting a different construction.

But if considered in another view, the result is the same. It may be regarded as a punishment of the last of the three offences, which, if it stood alone, would be a simple larceny, but enhanced and aggravated by the two previous convictions, is regarded by the law as a highly aggravated crime. This is conformable to the general principle and policy of this class of statutes, inflicting increased penalties upon second and third offences. The increased punishment is not regarded as an additional punishment for the prior offence, which would be unjust; but the prior conviction is regarded as giving a character of increased aggravation to the subsequent offence. Whether therefore it be regarded as a punishment for the crime of being a notorious thief, or whether it be considered as a punishment for the third larceny, enhanced and aggravated by the two prior convictions, standing on the same record at the same time, in either case it must be regarded as an offence, punishable by confinement to hard labor for a term of years.

But there is another objection to the validity of this judgment, which we think is unanswerable, and fatal.

In order to warrant an award of the additional punishment imposed by the statute, two things must concur; the prisoner must stand for punishment and sentence, convicted of a crime, the punishment whereof is by law confinement to hard labor, for a term of years, and he must have been twice before sentenced to a like punishment. When White was sentenced at

Digitized by Google

Ex parte White.

Plymouth in 1830, it appears very satisfactorily, that he had been twice before sentenced to punishment for a term of years, and then the only question is, whether he then stood convicted of a crime, by law punishable by confinement for a term of years. It appears by the record, that he was indicted and convicted for stealing one horse of the value of $100, without breaking any building or other aggravation. We have already seen that this is a simple larceny, which cannot be punished by confinement to hard labor for a longer term than one year. We decided in *Seymour's case*, (*ante*, *p.* 40,) that that is not a term of years within the meaning of the statute; consequently White was not then convicted of a crime punishable, by law, by confinement to hard labor for a term of years, and the case for awarding the additional punishment, of confinement for life, did not exist. If the punishment could not have been awarded then, had the facts of the former convictions been then known and found by the verdict, and placed on record as the basis of the judgment, it could not be awarded upon the subsequent proceeding by information.

If it be asked, why, if the two convictions at Taunton in 1803 are to be taken as two convictions within the statute, as was held in Phillips's case, 11 Pick. 28, the conviction at Greenfield, being, as now held, a conviction for an aggravated offence, could not be deemed as a third conviction, so as to warrant the award of the additional punishment, the answer is obvious; this conviction was in 1817, and the statute imposing the additional punishment for a second and third offence, did not pass till February 1818.

We are therefore of opinion, that there is no ground upon which the judgment by which White was sentenced to the State prison for life can be sustained, and the same is accordingly reversed.

Leland for the prisoner.

Austin, Attorney-General, for the commonwealth.

Digitized by Google

Ex Parte Samuel Stevens.

Subsequently to the enactment of *St.* 1832, *c.* 73, an information was filed in the Municipal Court, praying that additional punishment might be awarded against a convict in the State prison, and setting forth first, a sentence to hard labor for a term of years and his discharge in 1824, secondly, a sentence to solitary imprisonment for three days and to hard labor for one year, and his discharge in 1828, and thirdly, a sentence to hard labor for a term of years, upon which he was still detained; and thereupon he was sentenced to additional punishment by solitary imprisonment for one day and confinement to hard labor for seven years. It was *held*, that this additional sentence could not be sustained under *St.* 1827, *c.* 118, § 19, 20, as a sentence upon a third conviction, but that it might be sustained under that statute as a sentence upon a second conviction.

June 27th. Shaw C. J. delivered the opinion of the Court. This case comes before the Court on a writ of certiorari, and the object is to submit to the Court the validity of a judgment of the Municipal Court at the November term 1832, whereby on an information filed by the attorney for the commonwealth, the prisoner Stevens was sentenced to an additional punishment, by confinement to hard labor for the term of seven years.

It appears by the record, that at the Municipal Court, December term 1820, the prisoner was indicted and convicted of three distinct larcenies at the same term; and was thereupon sentenced as a common and notorious thief, pursuant to the statute, to confinement at hard labor for the term of four years, and was discharged in 1824; — that by the name of Samuel Malone he was convicted before the Supreme Judicial Court, at Cambridge, October term 1825, for larceny in stealing a horse of the value of $ 100, without aggravation, upon which he was sentenced to three days solitary imprisonment, and confinement to hard labor in the State prison for one year, and was discharged in 1828; — and that at the Supreme Judicial Court, at Cambridge, October term 1829, he was convicted of an aggravated larceny, in stealing property from a shop, for which he was sentenced to three years hard labor in the State prison.

It was decided by the Court in *White's case*, at the present term, (*ante*, *p.* 90,) that a conviction and sentence, by which one is sentenced as a common and notorious thief,

Digitized by Google

under the statute of 1804, *c.* 143, is being sentenced to punishment by confinement to hard labor for a term of years, within the meaning of the statute of 1827, *c.* 118, § 19, 20. It is very clear that the conviction at Cambridge in 1829, of larceny in a shop, was the conviction of a crime the punishment of which was, by law, confinement to hard labor for a term of years. Both these therefore are within the provisions of the statute of 1827.

But upon the second conviction, being for a simple larceny without aggravation, the term of confinement to hard labor for which it was punishable, and the period to which the prisoner was actually sentenced, not exceeding one year, according to the decision in *Seymour's case*, (*ante*, *p.* 40,) it was not a punishment by confinement, for a term of years. The consequence is therefore, that according to the construction put upon these statutes, this prisoner was not liable to be sentenced as upon a third conviction, under the statute of 1827, and had the sentence been confinement to the State prison for life, the judgment would have been erroneous.

But the additional sentence in fact awarded upon this information was one day solitary imprisonment, and confinement to hard labor for seven years in the State prison. And by the statute of 1827, *c.* 118, § 19, a person convicted a second time, who has been once before sentenced for a term of years, is liable to an additional punishment, of thirty days solitary imprisonment, and seven years hard labor. The punishment therefore was such as the Court had authority to award against the prisoner as upon a second conviction; and without regard to the second conviction, as enumerated in the information, the first and third being sufficient, the prisoner was liable to the sentence actually awarded, as upon a second conviction. These judgments and convictions are entirely separate and distinct, and the insufficiency of one does not in any respect depend upon that of another. If, therefore, there is enough on the record to warrant the judgment, it ought to be sustained.

This reasoning would appear to be entirely sound, and the conclusion to which it leads satisfactory, were it not affected by the operation of *St.* 1832, *c.* 73, passed some months be-

Digitized by Google

Ex parte Stevens.

fore this judgment was rendered, and which, it is contended, had the legal effect and operation, though perhaps it may not have been so intended by the legislature, to prohibit and put an end to all additional punishments upon second convictions and in effect to repeal that part of *St.* 1827, *c.* 118, which provides for such additional punishments upon second convictions. The act relied on provides, that after its passage, no convict shall be sentenced to confinement, by force of the provisions alluded to in the statute of 1827, unless such convict has at two several times before been sentenced to confinement in the State prison, for a period, at each time, of more than one year, and has been twice discharged therefrom in due course of law.

The most obvious intent and purpose of this statute was to alter and vary the law and make it more explicit in the particular in which it had been before judicially held, (*Commonwealth* v. *Phillips*, 11 Pick. 28,) that two convictions at one and the same term, were two convictions within the statute, as it stood; and this statute intended expressly to provide, that to render a convict liable to confinement for life, he should have been at two different times sentenced and committed pursuant to his sentence, so as to be, in the popular language of the prison, a third comer.

But it is contended, that although this was the primary intent of the statute, yet that its language is clear and explicit, and broad enough in its terms, to include all cases where the convict has not been *twice* before sentenced for a term of years. But we are of opinion that this is not the necessary or true construction.

That the legislature, by this statute, intended to alter the law in some respects, is quite manifest, but the nature and extent of such alteration must be learned from its language.

In the first place, it is quite clear that the statute of 1827 is not repealed by this act, and this act only directs the manner in which, in certain respects, it shall be construed and carried into effect. To the extent of this restraint and modification, the former statute is repealed and no further. The liability to the additional punishments, still stands upon the statute of 1827. To what extent then does this act restrain its operation?

Digitized by Google

The act in question,* obviously alters the provisions of the former law, in two respects; first, by the words "more than one year," instead of "a term of years," and secondly, by referring to confinement generally, instead of confinement to hard labor. When therefore the solitary imprisonment and the confinement to hard labor together, both of which come under the general denomination of confinement, amount to more than one year, the case is within this statute, though it would not be within the statute prescribing confinement to hard labor for a term of years.

How then stands the prisoner's case. By the statute of 1827 he was liable to be sentenced as upon a second conviction, having before been once sentenced for a term of years, unless the power is restrained and taken away by the operation of this statute. But his case is precisely within the exception of this statute, which is this, "unless he has at two several times before been sentenced by competent authority to confinement in the State prison, for a period, at each time, more than one year." That his case is precisely within this exception, will be manifest from a recurrence to the facts. In regard to the first there can be no doubt; he was sentenced to upwards of four years confinement and discharged. In the second case, though not sentenced for a term of years, yet he was sentenced by competent authority to confinement in the State prison, for more than one year, to wit, one year and three days, and was discharged therefrom. We are therefore all satisfied that this statute did not restrain or prevent the operation of the statute of 1827, upon the circumstances of the prisoner's case, and that the sentence was right, under the former statute, as upon a second conviction, or in other words, as against a second comer to the State prison.

It is very possible, that the second of the convictions and sentences set forth in the information, was considered by the Municipal Court as a sentence for a term of years, under a different construction of the statutes, from that which we have

* This act is now repealed by *St.* 1833, *c.* 85, which re-enacts the provision by which second comers are liable, and substitutes confinement to hard labor, for a period not less than one year, for hard labor for a term of years.

Digitized by Google

Ex parte Stevens.

felt constrained to adopt, and that the conviction upon the information was regarded as a punishment awarded as upon a third conviction, and the mitigated penalty of confinement for seven years, instead of life, awarded in pursuance of the 2d section of the statute of 1832, c. 73, which allows the court a latitude in this respect, upon third conviction. But if this were more clear than it is, we think it would make no difference. The question for this Court is, whether the judgment was correct or not, and that must be decided by the record. Whether that court came to the conclusion which it did, through the same views of the law and the same course of reasoning which have guided us, or not, can make no difference, when the conclusion is the same. The result is, that the judgment of the Municipal Court is affirmed.

Leland for the prisoner.

Austin, Attorney-General, for the commonwealth.

HULDAH EATON *versus* SHEPHERD SIMONDS.

The widow of a mortgager is entitled to dower in the equity of redemption, notwithstanding that in the deed of mortgage she may have released her right of dower, and although she cannot maintain an action at law against the mortgagee or his assignee, yet if the mortgage is not foreclosed, a court of equity will interpose and allow her to redeem.

The owner of land mortgaged it, and his wife released her right of dower; the equity of redemption was afterwards sold to the defendant on an execution issued against the mortgager, and the defendant having paid the amount due thereon to the mortgagee, claimed an assignment of the mortgage; but, the mortgagee declaring that an assignment would be unnecessary, the mortgage was discharged upon the margin of the record in the registry of deeds. It was *held*, that this discharge was an extinguishment of the mortgage, and not an equitable assignment; and that the widow was entitled to dower in the land free from the incumbrance of the mortgage.

The owner of land mortgaged it, his wife releasing to the mortgagee her right of dower; and after condition broken the equity of redemption was sold to the defendant on an execution against the husband. The defendant entered immediately into possession, and afterwards he procured an assignment of the mortgage. He had continued in possession more than three years after the assignment, when the husband died, but no notice was ever given to the wife that he was in possession for condition broken. It was *held*, that the wife had a right to redeem, in order to be let in to her dower.

It was also *held*, that the defendant was not chargeable with the rents and profits received during the life of the husband, but that he must account for those received since his death; and that the allowance to the defendant, in the account, for repairs must be limited to such as were made since the death of the husband.

Digitized by Google

Upon a bil. to redeem, it was *held*, that if the mortgagee actually occupied the estate himself, he is not to be allowed, as a compensation for his care of the estate, any commission on the rent with which he is charged by the master in chancery, in stating the account.

Eaton v. Simonds.

THIS was a bill in equity to redeem certain mortgaged real estate in Boston.

The bill alleged, that the complainant was, on May 16, 1805, married to Nathan Eaton of Boston; that during the coverture, he became seised of the premises, and on October 22, 1819, mortgaged them to Lucy Ridgway, in order to secure the re-payment of the sum of $ 1000 borrowed of her and which was payable in two years with interest; that the complainant became a party to the conveyance, so far as related to her right of dower; that on or about April 26, 1823, the sum so borrowed not having been fully repaid, the equity of redemption was attached by a deputy sheriff upon an execution issued on a judgment recovered against the mortgager, and by virtue of such execution was sold by auction to the respondent; that the respondent, having on May 26, 1823, obtained a conveyance thereof from the deputy sheriff, took possession of the premises, and has ever since continued to take the rents and profits thereof; that on or about January 3, 1824, the respondent obtained an assignment of the mortgage from Lucy Ridgway; that on August 31, 1828, the mortgager died; that upon his death, the complainant became entitled to dower in the premises, subject only to such mortgage, and had lawful right to redeem, upon tendering payment of the amount due thereon; that on April 3, 1829, the complainant demanded of the respondent an account of the sum due on the mortgage, and of the rents and profits, in order that she might make such tender, but that the respondent had unreasonably refused to render any account whatever; that although the respondent entered into possession of the premises under the purchase of the equity, yet he never made known that he had taken possession, in the presence of two credible witnesses, for a breach of the condition of the mortgage and for the purpose of foreclosing, and that no notice was ever given to her of any intention on his part to make such entry; that the respondent sometimes pretends, that in

Digitized by Google

Eaton v. Simonds.

November 1811, Nathan Eaton mortgaged the premises to William Eaton, to secure the payment of divers promissory notes, payable by Nathan to William, and that afterwards, three of the notes remaining unpaid, the same were assigned, together with the mortgage, to George Blake, Esq., a counsellor of this Court, and that the complainant, by joining in such mortgage, and thereby relinquishing her right of dower, is now barred therefrom, as well as from any right of redeeming the premises; but the complainant charges, that all the sums due upon such mortgage were paid by Nathan Eaton, and that afterwards Blake discharged the same in the margin of the record in the registry of deeds, and that the mortgage was thereby extinguished. Wherefore the complainant prays, that the respondent may state the amount of the mortgage to Ridgway and of the sums paid thereon; that an account may be taken of the rents and profits, and if it shall appear that they have been more than sufficient to satisfy the principal and interest of such mortgage, that the residue or her just proportion thereof may be paid over to the complainant; that the complainant may be permitted to redeem the premises, and have her dower set out therein, she hereby offering to pay such sum as shall be due to the respondent; that he may be ordered to deliver up possession of the premises to the complainant; and that she may have such other and further relief &c.

The answer denies that the mortgager was so seised of the estate as is alleged in the bill, or that the complainant has any right to redeem the same, and alleges that on November 7, 1811, William Eaton sold and conveyed the premises in fee to Nathan Eaton, and that the mortgage to William, which is referred to in the bill, was made at the same time, to secure the payment of a portion of the purchase money; that Nathan Eaton died without ever having paid or tendered to the respondent the sum paid by him on the purchase of the equity of redemption, amounting to $ 1750, with interest, or in any manner redeemed or attempted to redeem such equity, and without ever having paid or satisfied the sums secured by either of the mortgages or procured them, in any manner, to be discharged; that on July 22, 1823, it was agreed between

Digitized by Google

Blake and the respondent, that Blake should transfer to the respondent the notes and mortgage so assigned to Blake by William Eaton, and that the respondent should pay to Blake the principal and interest due thereon, amounting to $ 722·68; that on the same day the respondent, having paid this sum in pursuance of this agreement, expected and claimed an assignment of the notes and mortgage; but that Blake declared that any assignment thereof would be unnecessary, inasmuch as the respondent had purchased the equity of redemption; that thereupon Blake discharged the mortgage so assigned to him, upon the margin of the record in the registry of deeds, for the benefit of the respondent; and that neither Nathan Eaton, nor any one in his behalf, ever paid such sum to Blake, or any part thereof, or in any manner caused such mortgage to be so discharged; that the several notes aforesaid, and the interest accrued thereon, still remain due to the respondent; and that by reason of all these facts, purchases &c., and the lapse of time after the purchase of the equity of redemption and before the death of Nathan Eaton, the respondent had an absolute and irredeemable estate in the premises.

The answer further denies that the respondent ever took possession of the estate by force of these mortgages or either of them, or that he ever attempted to foreclose the same, or became the trust agent for receiving the rents and profits under the mortgages; and alleges that, on the contrary, he has uniformly claimed to be in possession and to receive the rents and profits, by virtue of the conveyance of the equity of redemption to him by the deputy sheriff.

The answer further alleges, that although the respondent cannot say certainly what the estate might have produced if rented, he having occupied the same in person, yet, according to the best of his knowledge and belief, the average value of the estate, since the same came to his possession, has not exceeded the sum of $ 200 per annum; denies that the rents and profits ought to be applied exclusively in discharge of the mortgages or either of them; and alleges that he is advised and believes, that if it shall be adjudged, that he is bound in any manner to account for such rents and profits, the same should be first applied in discharge of the sum paid by him for the equity of redemption.

Digitized by Google

Eaton v. Simonds.

The Court ordered that, on the coming in of the answer, the cause should be referred to one of the masters in chancery, to examine and state the amount due on the mortgages, with the circumstances appearing on record or otherwise, in relation to the discharge or assignment of them or either of them, the amount of the rents and profits which have been or might have been made of the premises, and the amount laid out in necessary repairs and betterments by the respondent, since he came to the possession thereof.

On June 8, 1830, the master made his report.

The complainant excepted to the report, on the ground that the master allowed a commission of five per cent. to the respondent on the amount of the rents with which he charged him, when in truth the respondent himself occupied the estate, and consequently incurred no expense, and was put to no labor in letting the house or collecting the rents. The complainant prayed that the residue of the report might be confirmed.

The respondent excepted to the report for the following reasons, among others: — 1. because the master considered that, in contemplation of law, the respondent was in possession of the estate under and as assignee of the mortgages from the time the same were purchased by him, whereas he was in fact in possession under the conveyance to him of the equity of redemption; this being according to his intention and his best interest and advantage: — 2. because the master did not allow the respondent, as a proper charge upon the estate, the sum of $ 1750, paid by him for the equity of redemption: — 3. because the master allowed and charged against the respondent, in the account of rents and profits, those sums received by him *before* the death of Nathan Eaton, as well as those received after his decease; when in truth the respondent avers, that being in possession under his purchase of the equity, he had a right to apply the rents and profits towards the sum paid for the equity, up to the time of the decease of Nathan Eaton and up to the time of the demand for an account, if no longer.

June 15th, 1830.

D. A. Simmons for the respondent. We suppose that the estate of the respondent in the premises is absolute and not subject to redemption. *James* v. *Morey*, 2 Cowen, 246; *Walker* v. *Griswold*, 6 Pick. 416. The mortgager had lost

Digitized by Google

his right to redeem, before his death, and therefore no right of dower in the equity of redemption could accrue to the widow, upon that event. *Ingersoll* v. *Sawyer*, 2 Pick. 276; *Punderson* v. *Brown*, 1 Day, 93.

As to the first exception of the respondent, the following cases are in point: *James* v. *Morey*, 2 Cowen, 246; *Gardner* v. *Astor*, 3 Johns. Ch. R. 53; *Gibson* v. *Crehore*, 3 Pick. 475; Powell on Mortgages, (Rand's edit.) 1088; *Popkin* v. *Bumstead*, 8 Mass. R. 491; *Harris* v. *Dexter*, 2 Mason, 531.

As to the third exception of the respondent, we cite *Herbert* v. *Wren*, 7 Cranch, 370.

Aylwin, for the complainant, cited *Gibson* v. *Crehore*, 5 Pick. 146; *Snow* v. *Stevens*, 15 Mass. R. 278; *Casborne* v. *Scarfe*, 1 Atk. 603: *Wade* v. *Howard*, 6 Pick. 492.

March 31st 1832

WILDE J. delivered the opinion of the Court. This case comes before us on exceptions taken by both parties to the report of the master; but the principal question depends upon the facts appearing by the bill and answer. The question is, whether the plaintiff is entitled to dower in the estate described in the bill; and if so, upon what terms she may enforce her claim in a court of equity. That she has an equitable claim of dower is fully settled by the decision in the case of *Gibson* v. *Crehore*, 5 Pick. 146. It was decided in that case, and so it had been frequently held before, that a widow is dowable of an equity. And although she cannot maintain an action at law against the mortgagee, or his assignee, after having joined her husband in a mortgage, relinquishing her right of dower, yet if the mortgage is not foreclosed, a court of equity will interpose and allow her to redeem.

The question then is reduced to this, namely, whether the plaintiff, to entitle herself to dower, is obliged to redeem, or to contribute her share to redeem, both of the mortgages mentioned in the bill. The plaintiff admits, in her bill, that she is bound to redeem the mortgage to Lucy Ridgway, that mortgage having been regularly assigned to the defendant. But she denies her liability to redeem the other mortgage, given to William Eaton, because this mortgage, as she avers, has been paid and discharged, and is no longer an existing

Digitized by Google

Eaton v. Simonds.

incumbrance on the premises. The answer admits that this mortgage was assigned to George Blake, Esq., and that the defendant has paid the full amount due thereon to Blake; and that Blake thereupon discharged the mortgage upon the margin of the record thereof, for the benefit of the defendant. But this discharge, the defendant's counsel contend, will operate as an equitable assignment, as it was so intended to operate by the parties; and that the union of the legal and equitable titles may well exist without producing the effect of a merger, or the extinguishment of the mortgage. Perhaps this might be so, if the discharge could be considered as an assignment of the mortgage.

The general principle is, that when the purchaser of a right to redeem takes an assignment, this shall or shall not operate as an extinguishment of the mortgage, according as the interest of the party taking the assignment may be, and according to the real intent of the parties. *Gibson* v. *Crehore*, 3 Pick. 482. But Chief Justice *Savage* remarks, in the case of *Coates* v. *Cheever*, 1 Cowen, 460, "that the spirit of the cases seems to be this; that where the tenant in possession enters by virtue of a purchase from the mortgager, then the subsequent purchase of the mortgage by him is an extinguishment." And that case was decided upon that principle. The same principle is laid down in *James* v. *Morey*, 2 Cowen, 301, and in other cases. *Forbes* v. *Moffatt*, 18 Ves. 390, *Gardner* v. *Astor*, 3 Johns. Ch. R. 53. The rule at law is inflexible, that where a greater and a less estate meet and coincide in the same person, in one and the same right, without any intermediate estate, the less estate is immediately annihilated or merged; and the same rule applies to the union of the legal estate with the equitable interest. But this rule is not inflexible with courts of equity, but will depend on the intention and interest of the person in whom the estates unite.

In the present case, however, the doctrine of merger is not applicable, for the estate in the mortgage of William Eaton was never assigned to the defendant, and never vested in him; so that it could not unite with the equitable title in him, so as to operate as a merger. But this mortgage has been legally discharged, the debt has been paid, and can no longer

Digitized by Google

be set up as a subsisting title, either at law or in equity. It makes no difference that the defendant was advised and supposed that a discharge of the mortgage would be equally beneficial to him, as an assignment. This was a mistake, which, however, this Court has no power to correct.

With regard to the exceptions to the master's report in stating the account, we think two of them are well founded and are to be allowed.

The plaintiff excepts to the allowance of a commission to the defendant on the rents and profits, he having occupied the premises in person during the whole time. The rule is, that a mortgagee in possession, who manages the estate himself, is not to be allowed for his own care and trouble; otherwise, if he employs a bailiff, or lets the estate to a tenant; and so is the rule in England. *French* v. *Baron*, 2 Atk. 120; *Godfrey* v. *Watson*, 3 Atk. 518; *Bonithon* v. *Hockmore*, 1 Vernon, 316.

We are of opinion also, that the master erred in charging the defendant with the rents and profits during the life of the plaintiff's husband. He had a right to possession, and to the rents and profits, as against the husband, under his purchase of the equity, and it does not appear that he ever entered under the mortgage in question; nor had he any right to enter, the same having been discharged. Nor does it appear, that he entered under the other mortgage. The plaintiff in her bill avers, that the defendant entered under his purchase of the equity, and never gave any notice of his entry under the last mentioned mortgage. This case, therefore, on this point, materially differs from that of *Gibson* v. *Crehore*.

We think, however, the defendant is liable to be charged with the rents and profits from and after the death of the husband, for he could not hold under the purchase of the equity against the plaintiff, and he is to be presumed to hold under his legal title. The defendant's charge for repairs is also to be limited to the time since the death of the husband.

These two exceptions are to be allowed, and the others are disallowed, and the account is to be corrected accordingly.

The Court having made a decree in conformity with this opinion a motion was now made on the part of the respond- *April 9th 1832.*

Digitized by Google

Eaton v. Simonds.

ent, to vary and rectify the minutes of the decree, on the following grounds: 1. because the decree supposes, that the mortgage to Eaton, which was allowed by the master as a just charge upon the estate, was to be considered as extinguished; 2. because no exception was taken by the complainant to the allowance of such mortgage by the master; but on the contrary, the complainant having excepted to the allowance by the master to the respondent, of a commission for collecting rents, prayed that the residue of the master's report might be confirmed.

June 27th, 1833.

WILDE J. delivered the opinion of the Court. Since an opinion was given in this case, the defendant has moved the Court to rectify the minutes of the decree, on the suggestion, that no exception was taken to the report of the master, in which the mortgage to William Eaton is stated as a subsisting and valid mortgage.

We were somewhat surprised at this suggestion, because not only was there such an exception in the copy furnished to the Court, but it appears from the plaintiff's bill, that she denied, in the outset, that this mortgage was a subsisting mortgage, which she was bound to redeem; and it hardly can be supposed, that her counsel would waive so important an exception. How the fact was, however, does not appear, for the counsel do not agree, and we do not think it important to inquire further, for if the plaintiff's counsel did omit to file the exception to the master's report in season, we think the question as to the discharge of the mortgage, and whether or not it could be considered as assigned to the defendant, was open for the consideration of the Court upon the bill and answer.

The answer expressly admits all the facts which have any bearing upon that question; and although the master was authorized to examine and state the facts and circumstances appearing on record or otherwise, in relation to the discharge or assignment of the mortgages mentioned in the bill, yet he was not empowered to decide upon those facts, except incidentally by stating an account of the sum due on the mortgages, with an account of the rents and profits and the repairs, &c. The reference was made out of the ordinary course, and be

Digitized by Google

fore the answer was filed, for the purpose of expediting the final decision of the cause; but it was not intended to authorize the master to decide the question whether the first mortgage was discharged or not, but to report facts. This then, we think, was an open question, and was, as it still seems to us, rightly decided. We have, however, examined the cases cited by the defendant, but do not find that they impugn, in any respect, our former decision, excepting perhaps the case of *Popkin* v. *Bumstead*, 8 Mass. R. 491; and that is distinguished from this, in an important particular. The defendant in that case had purchased of the administrator of the mortgager, and thereby acquired the same rights which the administrator would have had if he had paid off the mortgage for the benefit of the heirs. The mortgage was paid off after the death of the mortgager, when the widow's right of dower had become perfect, and it might therefore be supposed, that she was not entitled to dower without contributing her share of the redemption money, and that the case came within the principle laid down in *Gibson* v. *Crehore*, that where several are interested in an equity of redemption, and one only is willing to redeem, he must pay the whole mortgage debt; and in such case he is, in a court of equity, considered as assignee of the mortgage, and as standing, after such redemption, in the place of the mortgagee, in relation to the other owners of the equity.

Unless the case of *Popkin* v. *Bumstead* can be supported on some such distinction, it is difficult to perceive any legal or equitable ground on which it can stand. It is difficult also to say how that case could be decided on rules of equity, it being an action at law; but unless the principle of contribution does apply, the case seems opposed to the whole current of the authorities.

In the present case, the plaintiff clearly was not bound to contribute to the redemption of the first mortgage when it was paid off and discharged. That was done during the life of the husband, and clearly the wife then was not bound to contribute, and the husband was not bound to repay the mortgage debt, unless he saw fit to redeem the equity. The defendant therefore redeemed in his own right. He bought the equity sub-

Digitized by Google

Eaton v. Simonds.

ject to these mortgages, and there seems to be nothing inequitable in holding him bound to redeem them.

In the case of *Swaine* v. *Perine*, 5 Johns. Ch. R. 482, it is decided by Chancellor *Kent*, that if the heirs pay a mortgage, the wife shall contribute as to the amount paid by the heirs, but that as far as the husband had reduced the mortgage in his life time, that was doubtless so far a reduction for the benefit of the wife as well as himself. The same rule will hold where payment is made by the assignee of the husband during his life time; and this is decisive in the present case.

Motion to vary the minutes overruled.

Ralph W. Emerson *versus* Pliny Cutler *et al.*

Devise.—"I give and devise to my wife the use and improvement of one third part of all my real and personal estate, during her natural life; and I give and devise the same at her decease to my children, their heirs and assigns." It was *held*, that this clause gave a contingent and joint interest in the personal estate, to those of the children who should be living at the death of the testator's widow.

Devise:—"I give and bequeath all the rest, residue and remainder of my estate, real and personal, to my son and my daughters, to be equally divided between them; and to be distributed to them as they shall respectively arrive at the age of twenty one years and not before, to hold to them, their heirs and assigns forever; subject to the payment of the annuities aforesaid; and I do hereby authorize and empower my executors to receive the rents, income and interest of the residue of my estate, real and personal, hereby bequeathed to my children, and out of the same to pay the annuities aforesaid, and also appropriate and apply the whole of the remainder of said rents, income and interest, or such part as they shall judge necessary and proper, to the support and education of my children, until they respectively arrive at the age of twenty-one years." It was *held*, that the children took a vested estate in this residue immediately on the death of the testator, and that they took it as tenants in common and not as joint tenants.

Held also, that the income of the real estate and the income of the personal estate must contribute proportionably to the payment of the annuities.

Where real estate devised to a female infant was sold pursuant to a license of court, and she afterwards married and died under age, it was *held* that the proceeds of the real estate were personal estate, and consequently that her husband was entitled to the same.

So of damages paid for land of such infant taken for public use as a highway.

Bill in equity against Pliny Cutler, as sole surviving executor of the will of Beza Tucker and as late guardian of Ellen Tucker, one of the daughters, devisees and legatees of Beza

Digitized by Google

Tucker. The other devisees, legatees and persons interested, were made parties to the bill.

The bill states, that Beza Tucker, by his will dated March 6, 1820, and proved June 6, 1820, after devising and bequeathing divers tracts of land and divers annuities, bequeathed and devised as follows: —

"Item, I give and devise to my beloved wife Margaret, the use and improvement of one third part of all my real and personal estate, during her natural life; and I give and devise the same at her decease to my children, hereinafter named, to hold the same to them, their heirs and assigns."

"Item, I give and bequeath all the rest, residue and remainder of my estate, real and personal, to my son George Washington, and my daughters Mary, Margaret, Paulina and Ellen, to be equally divided between them; and to be distributed to them, as they shall respectively arrive at the age of twenty-one years, and not before; so far as the same can be done, consistently with the lien hereinafter created; to hold to them, their heirs and assigns forever; subject to the payment of the legacies hereinbefore given. And I do hereby charge the rest, residue and remainder of my estate, real and personal, herein bequeathed to my children, with the payment of the annuities aforesaid. And I do hereby authorize and empower my executors to receive the rents, income and interest of the residue of my estate, real and personal, hereby bequeathed to my children, and out of the same to pay the annuities aforesaid, and also appropriate and apply the whole of the remainder of the said rents, income and interest, or such part as they shall judge necessary and proper, to the support and education of my children, until they respectively arrive at the age of twenty-one years; and also to make insurance on my real estate against loss by fire, which is situated in Boston or Roxbury, if they think proper."

The bill further alleges, that the testator died in 1820, leaving a widow and the five children above named; that Ellen was married to the plaintiff in 1829; that she died in February 1831, without issue, and not having arrived at the age of twenty-one; that the plaintiff is her administrator; that at her decease Cutler the executor had in his hands a large amount

Digitized by Google

Emerson v. Cutler.

of personal estate of the testator; that during the life of Ellen the executor did not expend the whole of the rents and income of her share of the residue of real and personal estate given to her in the will, and that a surplus thereof remains in his hands.

That George W. Tucker died before Ellen, after attaining the age of twenty-one, testate, but leaving his personal estate mostly undisposed of.

That Mary Tucker died before George and before Ellen, intestate, under the age of twenty-one, and never having been married.

And that before the marriage of Ellen, the defendant Cutler sold, by leave of court, certain real estate of the testator in Roxbury, and received the proceeds thereof; and that certain real estate of the testator, in Boston, was duly taken for public use as a highway, and that damages therefor were paid to Cutler.

The prayer of the bill is, that the plaintiff may be paid what he is now entitled to receive, and that his rights in the residue may be declared and established; and that the rents and profits of the real and personal estate since the decease of Ellen, may be first applied to the payment of the annuities, so long as they remain outstanding.

The defendant Cutler filed an answer, in which the facts above mentioned are admitted to be true.

The answer also states, that William R. P. Washburn was appointed administrator with the will annexed, of George W. Tucker; that for some time after the death of George W. Tucker the respondent continued to hold all the property as he had done before, it not having been divided; that in July, 1831, he was appointed guardian of the testator's daughters Margaret, Paulina and Ellen, and that in that capacity he has received of Washburn their several shares of the estate of George, so far as the same has been divided and distributed.

The respondent further says, that he was advised that, as Mary died under age and not having been married, her interest in the estate, real and personal, of her father, belonged to her brother and three surviving sisters, in equal shares, and that her mother had no share or interest therein; that no ad

Digitized by Google

ministrator has ever been appointed on the estate of Mary; that the balance due to her on her private account was divided into four parts, which were carried to the credit respectively of her surviving brother and sisters; and that William A. Kent and his wife Margaret, who was the testator's widow, have instructed the respondent to take no measures to procure the appointment of an administrator on the estate of Mary, or to open any of the accounts thereof heretofore settled, but that they, William A. Kent and his wife, waive their right, if any they have or ever had, to a share of the personal estate of Mary on the ground that her mother was one of her heirs at law.

The answer of Cutler was referred to and adopted in the answers of the other defendants. Margaret Kent, the widow of the testator, died in February, 1833.

The case came before the Court upon the bill and answers, with the will, accounts and documents annexed to the pleadings.

March 21st.

Ashmun, for the plaintiff, contended, 1. that under the residuary clause in the will, the children took several and vested interests in "the residue" of the testator's estate, real and personal, subject to the charges thereon, and that the plaintiff, as husband and administrator of Ellen, was entitled to her share, being one fifth, of the personal estate embraced in such residue. 1 Roper on Legacies, (1st Amer. edit.) 376, 387: *Shattuck* v. *Stedman*, 2 Pick. 468.

2. That in the devise to the widow, of one third part of the real and personal estate, during her life, and after her decease to the children, it was the intention of the testator to dispose of the real and the personal estate in the same manner, and that the children took a vested interest, as tenants in common, and not as joint tenants, as well in the personal as in the real estate, and consequently, that the plaintiff was entitled to one fifth of this third part of the personal estate, subject to the widow's right to the income thereof during her life.

3. That Ellen, and consequently the plaintiff, was entitled to a distributive share of the personal estate of George and Mary

4. That the proceeds of the real estate sold by Cutler under license of court, and the damages received by him for the real

Digitized by Google

Emerson v. Cutler.

estate taken for public use as a highway, were personal estate at the time of Ellen's decease, and the plaintiff was entitled to her share of the same.

5. That the annuities should be paid out of the income of the real and of the personal estate, *pro ratâ*.

Washburn, for the defendants, argued that "the residue" was given to the executors, with instructions to apply the income to the support and education of the children during their minority, and that the share of any child was not to vest until such child should arrive at the age of twenty-one years. *Leake* v. *Robinson*, 2 Meriv. 384; *Pulsford* v. *Hunter*, 3 Bro. C. C. 419; Fearne, (7th edit.) 552, note; 2 Dane's Abr. 245; 1 Roper on Legacies, (1st Amer. edit.) 383; *Covenhoven* v. *Shuler*, 2 Paige, 122, 130.

That the personal estate given to the widow during her life would not vest in the children until her death, and that it would then vest in those only who should survive her; but that if it vested in the children immediately upon the death of the testator, they took as joint tenants and not as tenants in common. 4 Dane's Abr. 762; *Denny* v. *Allen*, 1 Pick. 147; *Shore* v. *Billingsly*, 1 Vern. 482; *Cray* v. *Willis*, 2 P. Wms. 528; *Webster* v. *Webster*, 2 P. Wms. 347, *Campbell* v. *Campbell*, 4 Bro. C. C. 15; *Westcott* v. *Cady*, 5 Johns. 348; *Hayden* v. *Stoughton*, 5 Pick. 528; *Brigham* v. *Shattuck*, 10 Pick. 306; 2 Williams on Exec. 770.

That the proceeds of the real estate sold and the damages paid for the real estate taken for a highway, were to be held by the executor in trust for the persons who would have taken the real estate itself, if it had not been thus disposed of. *Pierson* v. *Shore*, 1 Atk. 480; *Dagget, Petitioner, &c.*, 3 Pick. 280; *Moses* v. *Murgatroyd*, 1 Johns. Ch. R. 119; *Purdy* v. *Doyle*, 1 Paige, 558; *Champlin* v. *Baldwin*, 1 Paige, 562; *Hancock* v. *Minot*, 8 Pick. 29; *Kenny* v. *Udall*, 5 Johns. Ch. R. 464.

And that the annuities were not to be apportioned upon the rents and profits of the real and personal estate, the rents not being required for that purpose, but were to be paid out of the income of the personal estate alone. *Thompson* v. *Tappen*, 5 Johns Ch. R. 518; *Rogers* v. *Rogers*, 1 Paige,

Digitized by Google

188; *Lupton* v. *Lupton*, 2 Johns. Ch. R. 628; *Livingston* v. *Newkirk*, 3 Johns. Ch. R. 312; *Smith* v. *Kniskern*, 4 Johns. Ch. R. 9; *Seaver* v. *Lewis*, 14 Mass. R. 84, 1 Roper on Leg. (1st Amer. edit.) 484.

June 27th

SHAW C. J. delivered the opinion of the Court. There is no doubt, that the plaintiff, either in his own right as husband, or as administrator of his deceased wife, is entitled to all the personal property which vested in his wife prior to or during the coverture, and that the defendant Cutler is bound to render an account of all such personal property remaining in his hands, at the time of the decease of the plaintiff's wife.

1. The first material question in the case, arises upon the construction of the residuary clause in the will of Beza Tucker. It was contended on the part of the respondents, that this clause gave a joint and contingent interest in the two thirds of the real and personal estate, subject to the charges upon them, to the son and four daughters of the testator, depending upon the event of their arriving at the age of twenty-one years, and that as Ellen did not attain that age, her share never vested. But the Court are of opinion, that by force of this provision, the son and four daughters took a vested estate in this residue, which took effect immediately upon the decease of the testator; and that they took such estate as tenants in common, and not as joint tenants.

That it was a vested estate in the children appears manifest from several considerations. It was in terms given directly to them and their heirs, and not, either in terms or by implication, to the executors in trust, till they should respectively arrive at full age. The payment and distribution only of the estate, is suspended till the children respectively come of age. The executors are not made trustees of the legal interest, but directed as to the mode of managing, and the time of paying over and putting the children in possession, of the personal estate given to them respectively. The will authorizes and directs the executors to receive the rents, income and interest of the estate, real and personal, thereby bequeathed to the children, and after paying the annuities, to apply and appropriate the whole of the remainder, or such part as they might judge necessary, to the support and education of the children.

Digitized by Google

Emerson v. Cutler.

Upon the other point, the Court are of opinion, that without reference to the statute, providing what shall be deemed requisite to create a joint tenancy in lands, (*St.* 1785, *c.* 62, § 4,) the residuary clause in question gave to the five children an estate of one fifth each, in severalty, and not a joint estate. Whatever may have sometimes been held in regard to certain common law conveyances, it has ever been considered a settled rule in the construction of a will, that where a testator gives to two or more, property real or personal, "equally to be divided," or "share and share alike," or "in equal shares," or other equivalent expressions indicating an intent that the objects of his bounty, shall have their respective shares of the entire thing granted, this shall be deemed a tenancy in common, and not a joint tenancy, unless there be other express provisions, showing a clear intention on the part of the testator, that they shall take as joint tenants, or that the survivor shall take the whole. Bac. Abr. *Joint Tenants, F.*

In this residuary clause, there are several provisions, indicating in our judgment a clear intent of the testator, to give several estates and interests to his children, and nothing to counteract or control that construction. The words "equally to be divided between them" are decisive upon this point *Denn* v. *Gaskin*, Cowp. 660. And in the same case it was stated by Mr. Justice *Aston*, that these words had been held to constitute a tenancy in common, in a deed, and such, we have no doubt, is the law at the present day. But in this will, this construction is strengthened and put beyond doubt, by the succeeding clause, "to be *distributed* to them, as they shall *respectively* arrive at the age of twenty-one years." Both the words "distributed" and "respectively" look to division into parts, and to the exclusion of survivorship, and as the children could not arrive at the age of twenty-one, at the same time, the share of each was to be separated and severed from the whole at successive periods. The consequence is, that one fifth of the residue of the real and personal estate of her father vested in Ellen, notwithstanding she did not attain the age of twenty-one years, and that the plaintiff, as husband and as administrator of his deceased wife, is entitled

Digitized by Google

to one fifth of the personal estate and the produce and increase thereof, and to an account of the rents and profits of one fifth of the real estate, subject of course to the charge of the annuities and to all such payments, as the respondent Cutler has rightfully made on her account, in his capacity of executor or guardian.

2. The next question is, whether the plaintiff can claim any interest in the one third of the testator's property given to his wife Margaret for her life, and at her decease to the five children. It will be recollected that Margaret the mother survived her daughter and afterwards died. This question can only affect the personal property thus given. The mother being entitled to the real estate for her life, which continued till after the decease of Ellen, no claim would exist to the income of that real estate; and as Ellen died without having had issue born alive, whether she took a vested interest in the remainder or not, the plaintiff could have no claim upon it. If it was a contingent remainder, it went to her surviving sisters by force of the will; and if vested, it went to them as her heirs at law. Whether contingent or vested, therefore, is immaterial. The question then is, whether the plaintiff takes any interest in the personal property, thus given to the widow for life, and at her decease to the children; and we think it clear that this personal property was a contingent and joint interest to those of the children, who should be living at the death of the mother, and that as Ellen deceased before her mother, she took no interest which the plaintiff can now claim. It was contingent till the death of the mother, and that contingency did not happen in the lifetime of the plaintiff's wife. Whether the real estate given by the same clause to the wife for life, with remainder to the children, constituted a vested or contingent remainder, we give no opinion, and for the reasons already stated, it is not necessary to give one.* But we think the rules applicable to the subject affecting real and personal estate, are somewhat different. The principle is stated by Mr. Chief Justice *Parsons*, in *Dingley*

* At March term 1835, in *Nash* v. *Cutler et al.*, it was held to be a vested remainder.

Digitized by Google

Emerson v. Cutler.

v. *Dingley*, 5 Mass. R. 537. After citing a similar clause in a will, and the argument drawn from it, he says: "This argument would have great weight in the devise of money or chattels for life, and a devise over to be equally divided among the sons on the death of the first devisee. For of a chattel there can be no remainder, which may vest and afterwards open, to let in after-born children; and the interest in it must be contingent, until the time provided for the distribution of it, in order that they may take." But the Court are also of opinion, that this gift of personal property, to the children after the decease of their mother, was a joint gift, and that those only took, who survived the mother. The words indicating division and distribution, and making the property distributable at different times, are all wanting in this clause. It has been argued, that as by force of the statute already cited, the real estate devised by this clause of the will, must have been construed to create a tenancy in common and not a joint tenancy, and as it was the intention of the testator that the real and personal estate should go together, we ought to consider the gift of the personal property to be within the equity of the statute, and to hold it also as a gift in severalty, and not a joint gift. But we cannot yield to the force of this argument. By the common law rule of construction, this would be a joint gift. The legislature, by positive enactment, have interposed and declared that certain provisions in gifts, grants, feoffments and devises of *real estate*, shall have a different construction; as this is in terms confined to real estate, it would be going beyond the just rule of construction to hold it applicable to gifts and bequests of personal property. On both grounds we are of opinion, that the plaintiff's deceased wife took no interest in this third of the personal estate given by her father's will. *Stuart* v. *Bruce*, 3 Ves. 632.

3. The next claim made by the plaintiff is for a share of the property of his wife, which came to her as heir of her sister, who died under age and unmarried and intestate. It appears by the facts, that whilst the property remained in the hands of the executor undivided, for the use and benefit of all the children, she thus died. It has before appeared, that the income of her share of her father's estate was to be applied

Digitized by Google

to her support and education; it would follow as of course, that the surplus would be added to the principal, to accumulate and be paid over to her on her arrival at the age of twenty-one. It further appears, that by the consent and agreement of all parties interested, the defendant Cutler stated an account with the estate of Mary, which was satisfactory, and struck a balance, which was divided into four equal parts, one of which was carried to the credit of each of the surviving children, and of course to Ellen.

It is unnecessary in the present case, to consider the question, whether a distributive share of Mary's estate, would by force of the statute of distributions (*St.* 1805, *c.* 90, § 1,) go to her mother as of a child dying under age and unmarried, or whether that statute does, or not, apply to estate held by such child, by *will* and not by descent.* This question may perhaps become material hereafter between other parties. But it appears in the present case, that the mother, together with the defendant, William A. Kent, who had in the mean time intermarried with the mother, expressly assented to this arrangement and waived all claim to a distributive share of the personal property of her daughter, and the same parties have here by their answer waived all such claim, and offered to confirm the account thus stated by the executor, and waive all claim to open it. Regularly perhaps there should have been an administration on the estate of Mary; but, as she probably owed no debts which have not been discharged by her guardian, as the father and mother have waived all claim to a distributive share, and all the parties interested have by their guardians consented to divide and distribute the estate of Mary without an administration in the same manner as it would have been distributable by law, under an administration, and agreeably to this arrangement Ellen was credited by Cutler as her guardian, with one fourth of the net balance of the estate of Mary, this must be considered as a payment of money to her guardian on her account, which was a vested interest at the time of her decease, and which the plaintiff is entitled to recover.

* In *Nash* v. *Cutler et al.*, March term 1835, it was determined that the mother was entitled to a distributive share of Mary's estate.

Digitized by Google

Emerson v. Cutler.

4. The plaintiff also claims a share of the estate which came to the deceased wife, as one of the heirs of her brother George. He died after arriving at full age, unmarried, having made a will, by which he disposed of a small part only of his personal estate. The residue of his personal estate, by force of the statute of distributions, descends as intestate estate; he died in the lifetime of his sister Ellen, and of course she had a vested interest in a distributive share of his personal property, subject to the payment of his debts, which the plaintiff is entitled to receive, in right of his deceased wife. It may be questionable whether there should not be a final settlement of the account of the administration *cum testamento annexo* at the probate office, before this distributive share can be fully paid; but so far as the defendant Cutler, in his capacity of guardian of Ellen, had received of the defendant Washburn, as such administrator, any sums of money on account of Ellen's distributive share of George's estate, the plaintiff is now entitled to an account of it.

5. The next question is, whether the plaintiff is entitled to claim a share of the proceeds of certain real estate, which was sold by the defendant Cutler, as her guardian, under a license of court; and also a share of certain sums of money allowed and paid by the city of Boston as and for damages, upon taking for public use a certain part of the real estate which Beza Tucker devised to his children, including Ellen, the same being an estate situated in Merchant Row, so called, in Boston, and taken conformably to the provisions of law, to widen and improve a public highway in the city. These two sums appear to us to stand upon the same footing, in regard to the present claim. The money paid by the public, for a perpetual easement upon land, the effect of which is to deprive the owner of all beneficial use of the land, and money received upon the sale and alienation of the title, appear to us to stand upon the same principle, as it regards the present question, the proceeding by which the real estate is converted into personal being in both instances warranted by law. And the Court are of opinion, that the plaintiff is entitled to the distributive share of his deceased wife in the proceeds of the estate sold by her guardian under a license of court, and also in the proceeds o

Digitized by Google

and taken for a public highway. They were both sums, which either as money actually paid, or as *choses in action*, vested in the wife, before or during the coverture, and therefore the plaintiff in his own right, or as administrator, is entitled to them. They were in the hands of Cutler as her guardian for her use and benefit.

In pursuing this inquiry, the true question is, what was the character of the property at the time of the decease of Mrs. Emerson, in order to determine whether it shall go to the heir at law, or the administrator. And we think that, at that time, it was personal property, subject to all the conditions and rules of law applicable to personal property. If these proceeds are not to be deemed the personal property of the ward as soon as received, when do they become so? When the ward comes of age? No rule of law so directs; no principle which we can perceive requires it. Suppose the ward should die after twenty-one, but before the guardian has settled and paid over the proceeds, is there any reason for their going to the administrator in preference to the heir, which is not equally applicable when the ward dies before twenty-one? How does it differ from a sale made under a license, by the guardian of an adult *non compos*? And would not the real estate in such case be effectually changed into personal, for all purposes of distribution?

It appears to me that this result follows from the application of a few plain principles. The real estate of the minor is alienated by force of law, and the acts of the court and the guardian pursuant to law. The title of the ward is effectually divested. He acquired a sum of money as an equivalent, and the title to this money, which is personal property, is vested in him. On his death, the property to be distributed is personal, and the law governing the distribution of personal property must apply to it, without regard to the source whence it was derived. It seems no valid objection, to urge that if it had not been alienated it would have gone to the heir, as real estate. So where an adult owner of real estate alienates his estate by his own act, instead of the act of his guardian, and receives the money and dies. The money must be distributed as personal estate, and yet the same suggestion is

Digitized by Google

Emerson v. Cutler.

true, that but for such alienation, the heir, and not the administrator would have taken. And all derivative claims depending upon the legal distinction between real and personal estate, such as dower, curtesy and the like, will be governed by the same rule.

It is true that in many cases in equity, money shall be deemed land, and land money, for the purpose of fixing the beneficial interest. As where money is given to trustees to be laid out in land and settled on a person, and before the settlement such person dies, the heir who would have been entitled to the land, and not the administrator, shall have it. So where land is directed to be sold, and the proceeds given in a particular way; though not sold, the person intended to be benefited by the proceeds shall be deemed the equitable owner of the land. All this goes upon the rule of equity, that what is directed to be done with property, by one having the power of disposal, shall be deemed to be in fact done, and that beneficial interests shall be regarded, and not be deemed to be defeated by a mere contingency. But these rules do not apply. In distributing real and personal estate respectively, the law does not look to the funds from which it was obtained, but to its character at the time when the right to distribution accrues. If at that time a sum of money stands in place of land, by an actual disposition to that effect, not yet executed, he who would be entitled to the land shall have the money; and so conversely, where land is directed to be sold and converted into money, by a disposition not executed. These rules have no bearing on the present case, because here the whole power was actually executed, and the disposition entire and complete, in the one case, by the public in taking, and in the other by the guardian in selling the land, and in both the money was paid. It was paid to the guardian, merely because the minor had no legal capacity to receive the money and give a discharge, but it was the minor's interest and property, legally and beneficially, and the guardian was the mere agent, established by law, to act for her and supply the legal capacity.

But it is said, as already intimated, that this creates a difference in the mode of distribution. This is true. So if a

Digitized by Google

woman seised of real estate, arrives at twenty-one, sells her estate, places the proceeds in a fund for her separate use, for life, marries and dies; the money goes to her husband as personal property. If she had retained the real estate, it would have gone to her heir. Could the law look to the origin of this fund and distribute it as land, and divest the right of the husband? And yet what is the difference in such case between a woman above, and one under twenty-one, except the legal capacity to convey real estate? But if this want of legal capacity is supplied or superseded, in the one case, by the power of the public, and in the other, by the license granted to the guardian, and a legal sale and alienation is effected, the condition of the money received as the proceeds seems to be precisely the same as in the former case; it is personal property definitively vested in the minor owner, and in case of her decease, to be distributed as her vested personal property.

6. The last point discussed turns upon the question, whether the annuities are to be paid exclusively out of the income of the personal property, or equally contributed from the income of the personal and real estate. The testator, in one clause, charges the "*residue*" of his estate real and personal, given to his children, with the payment of the annuities &c. And in a subsequent clause he says, "I do authorize my executors to receive the rent, income and interest of the residue of my estate, real and personal, bequeathed to my children, and out of the same to pay the annuities &c."

It is manifest that it was the expectation and intent of the testator, that after the payment of his debts his personal property was to be invested in stocks or securities of some kind yielding income. And we think it clear, that by force of this direction the annuities are to be paid out of the income of the eal and personal estate proportionably.

So far as regards the charge of these annuities by the executor heretofore, up to the period of Mrs. Emerson's decease, we cannot percelve any necessity for distinguishing between the real and personal estate, because the interests of all the children were alike in both. But from and after her death, by which event the plaintiff came to have an interest in the

Digitized by Google

Emerson v. Cutler.

personal property, whilst the real estate descended to her heirs, the question becomes material. And we are of opinion, that these annuities are to be paid proportionably out of the income of the real estate and of the funded personal property yielding income. There is little analogy between this case, and that of the payment of debts and pecuniary legacies. The personal estate is the natural fund, out of which these are to be paid, unless a different direction is given. But the case of annuities charged upon real estate and funded personal estate, stands upon a different footing. It seems to have been the intent of the testator, after his debts were all paid, to put the residue of his estate in a condition to yield a regular income, that out of that income certain annuitants named should receive certain specified amounts during their respective lives, and the residue of course to go to those, to whom the capital itself was given. Now when by the occurrence of events, (whether foreseen or unforeseen by the testator is immaterial,) these funds, by the operation of law, go to different persons, being the direct objects of the testator's bounty, or those taking derivatively from them by operation of law, why should one fund be exclusively burdened, and the other wholly exonerated? We can perceive no equitable reason why they should not contribute equally.

This being a charge upon the income, we are of opinion, that if the different funds yield income in different proportions, the relative value of the income, and not of the capital, will determine the rate of contribution. For instance, if the whole property liable to contribute consists of $ 50,000 in real estate, yielding income at the rate of five per cent., say $ 2,500, and 50,000 personal, at six per cent., say $ 3,000, making from both, $ 5,500, the result would be, that towards every $ 55 of annuity, the real estate should pay $ 25 and the personal 30; and after the same proportions, whatever may be the aggregate value and the annual income of the real and personal estate respectively.

Digitized by Google

The President &c. of the AMERICAN BANK *versus* MARK DOOLITTLE.

Where an insolvent debtor assigns his property to a trustee for the benefit of his creditors who shall execute the indenture of assignment and thereby release their demands, a creditor may execute it upon a condition precedent; which, if not performed, will render such execution inoperative.

Where a creditor executed the deed of assignment, on condition that the property assigned was not then attached by any valid trustee process, it was *held*, that a trustee process served upon the assignee as trustee, in which there was a misnomer as to his Christian name, was nevertheless a valid trustee process, and consequently that the signature of the creditor was inoperative.

In an action by the creditor who thus executed the deed of assignment, against a co-promisor of the debtor, it was *held*, that the officer's return in the trustee suit, which stated that the person named in the writ as trustee was not to be found, but made no mention of any service on the assignee as trustee, was not conclusive, and that parol evidence was admissible on the part of the creditor, to prove that the writ had been served on the assignee.

ASSUMPSIT upon two joint and several promissory notes, each for $ 5,000, signed by the defendant and by Joseph Strong and others, payable to the order of Joseph Strong, and by him indorsed to the plaintiffs.

The defendant pleaded, that after the notes were indorsed to the plaintiffs, Joseph Strong, by an indenture dated December 9, 1829, assigned his property to Edward Hooker, in trust to pay divers creditors successively, and then to pay such creditors as should become parties to the indenture within thirty days; in consideration of which the other parties to the indenture released to Strong their respective claims and demands; that the plaintiffs became a party on certain conditions, and that those conditions were performed.

It was agreed that the plaintiffs might put in issue the performance of the conditions, and that no objections should be taken to the form of the pleadings.

At the trial the defendant produced the indenture, to which, it was admitted, the seal of the American bank was affixed on the 14th of December, 1829, with the following words first written over the seal: — "The President, Directors and Company of the American bank, by their president duly authorized thereto, hereby become parties to the aforegoing assignment, upon the express condition only, of reserving to

Digitized by Google

American Bank v. Doolittle.

the said corporation all collateral securities now held by them for the payment of the debts due, or to become due, to said corporation from said Joseph Strong; and upon the further conditions, that the property herein above assigned be or shall come into the hands and possession of the said assignee for the purposes of the said assignment, and is not attached by any valid trustee process or other attachment, previous to the date of this signature, otherwise the said signature to be void and of no effect." Under the seal of the American bank was written as follows: — "The above reservations on the part of the American bank are expressly assented to by the undersigned, and made a part of the foregoing deed;" and this was subscribed by William Whitney, one of the parties to the indenture, but not by any other of those parties.

The plaintiffs admitted that they had retained the collateral securities mentioned, but they insisted that the defendant was bound to show that all the assigned property came to the hands of Hooker the assignee, and that it was not attached, by trustee process or otherwise, at the time when the indenture was executed by the bank; and that at least he was bound to show what property did come to the hands of the assignee.

Evidence was introduced on the part of the defendant, showing that certain personal property of Strong passed into the hands of Hooker.

The plaintiff called Simeon Dwight junior, a deputy sheriff, to prove that he had served a trustee process on Hooker, attaching the funds in his hands, previously to the 14th of December, 1829, at the suit of Jonathan Dwight against Strong and his trustee.

The defendant produced an attested copy of the writ and an exemplification of the record in that suit, and objected to any parol testimony respecting a service on Hooker, on the ground that the officer's return was conclusive and could not be thus inquired into. The plaintiff also produced an attested copy of the writ, showing an alteration of the original return.

The evidence being ruled in, the officer testified, that Mr. Doolittle, as the attorney of Jonathan Dwight, had put into his hands the writ against Joseph Strong as principal, and Edward I. Hooker, of South Hadley, as his trustee. The

Digitized by Google

witness understood it to be intended for Edward Hooker the assignee, and served it by leaving a copy at his house. In copying it he first observed that the name was written Edward T. Hooker or Edward I. Hooker, he could not tell which. He supposed it was wrong, but he copied the writ, and left the copy on the 12th of December, 1829. A few days afterwards he handed the writ to Mr. Doolittle, with his return written upon it, setting forth the service on Edward Hooker. Some time after, Mr. Doolittle handed the writ to him again, and said he did not want any return on Edward Hooker. The witness then proposed to erase the return of service on Edward Hooker, and return *non est inventus* as to Edward I. Hooker. Mr. Doolittle made no objection, and the witness altered the return accordingly. There was no such person as Edward I. Hooker in South Hadley, nor any other Edward Hooker than the assignee.

A nonsuit was ordered, subject to the opinion of the Court upon the questions of law arising in the case.

April 3d.

F. Dexter and *W. H. Gardiner*, for the plaintiffs, contended that the conditions upon which they signed the indenture, were conditions precedent, and that the burden was upon the defendant to show that they had been performed. *Gardiner* v. *Corson*, 15 Mass. R. 500; 1 Chit. Pl. (1st edit.) 312, 319; *Worsley* v. *Wood*, 6 T. R. 719; *Davis* v. *Nichols*, 2 Chit. Rep. 320. But it appears, that at the time when the indenture was signed by the plaintiffs, a valid attachment by a trustee process subsisted. Parol evidence was admissible to show a service on Hooker the assignee, the return of the officer being only *primâ facie* evidence in regard to strangers. *Gyfford* v. *Woodgate*, 2 Campb. 117; *S. C.* 11 East, 296; *Cator* v. *Stokes*, 1 Maule & Selw. 600; Phil. Ev. (2d edit.) 294; 19 Vin. Abr. *Return*, *O*, *pl.* 15, 25, 26. The misnomer did not render the process invalid; it was pleadable only in abatement. *Jewett* v. *Burroughs*, 15 Mass. R. 469; *Smith* v. *Bowker*, 1 Mass. R. 76; *Gilbert* v. *Nantucket Bank*, 5 Mass. R. 97; *Franklin* v. *Talmadge*, 5 Johns. R. 84.

The conditions affixed to the plaintiffs' signature required the express assent of all the other parties to the instrument, but as no one except Whitney gave his assent, the signature was of no effect.

Digitized by Google

American Bank v. Doolittle.

C. G. Loring, for the defendant, argued that the conditions on which the plaintiffs executed the indenture, were repugnant to the provisions in the instrument itself, and were therefore to be rejected as inoperative and void. *Bradley* v *Peixoto*, 3 Ves. 324; Bac. Abr. *Condition*, *L.* He also insisted that they were conditions of defeasance, and not conditions precedent. 2 Stark. Ev. 91, note; 1 Wms's Saund. 320, note 4. But in point of fact, the defendant did prove a performance. The return on the trustee writ shows that it was not served upon the assignee, and parol evidence of a service is not admissible. *Bean* v. *Parker*, 17 Mass. R. 591; *Whitaker* v. *Sumner*, 7 Pick. 555. The return is conclusive as between the creditor and the debtor and all persons claiming under either of them. Now here the plaintiffs claim under Hooker and under Strong, and Hooker's right to retain the property depended on that return. By a "valid" attachment was meant one which would deprive the assignee of the property; but Hooker was not even called into court to answer as trustee. If Hooker had appeared, he might and would have pleaded the misnomer in abatement, and this would have avoided the process from the beginning. *Commonwealth* v. *Perkins*, 1 Pick. 388; *Commonwealth* v. *Hall*, 3 Pick. 262. Further, it appears that other creditors had signed the indenture before the supposed service on the assignee, whose demands would have absorbed all the personal property in his hands; so that in this point of view there was no valid attachment.

June 27th.

It was observed by the *Court*, that where a note is made jointly and severally by several promisors, payable to the order of one of their own number, and is by him indorsed and negotiated, it is to be deemed a joint and several debt due to the holder from the promisors, in the same manner as if the payee had not been one of them; that a release of one of several joint, or joint and several debtors, is a release of all; that the plaintiffs had a right to become parties, upon a condition precedent, and if that condition was of such a nature that it would render the instrument inoperative without the consent of the other parties, then, until such assent given, expressly or by implication, the instrument, as the act of the

Digitized by Google

plaintiffs, would be inoperative, or the operation of it suspended; that the condition, that the property had not been attached by any valid attachment (whatever might be the case with the other conditions) was a condition precedent, and if, at the time when the deed was executed by the plaintiffs, the property had been attached and was then under a valid attachment, it avoided the deed, or rather the deed never took effect; that it was questionable whether a release could be executed upon a condition subsequent, for if the debt is once released, it would seem to be gone forever; that the instrument reciting that the property had been assigned to Hooker, the presumption was that some portion of it was of a nature to be charged by a trustee process; that the attachment was made on the 12th of December and subsisted on the 14th, and the fact that it was afterwards discharged, either by the non-return of the writ, or by an entry that neither party appeared, was immaterial; that the return of the officer was *primâ facie* evidence and not conclusive, and it was competent for the plaintiffs, not being party nor privy to the trustee suit, to show, that in fact an attachment was made and was subsisting at the time when the plaintiffs executed the indenture, though the return of it was afterwards suppressed, by order of the plaintiff in the trustee suit, who alone could control it; that the misnomer of the trustee did not render the attachment void, but the assignee, having funds, might have been held under the service and return, though named "Edward I. Hooker"; that if he had appeared, the process would have been amendable, and if he had not appeared, he might have been charged upon a *scire facias* setting forth the facts.

Nonsuit set aside and new trial granted.

Digitized by Google

HENRY B. SMITH, Administrator, *versus* THOMAS B. STRONG.

In an action for a breach of the covenants of seisin and right to convey, contained in a deed of certain land from the defendant to the plaintiff, dated May 22, 1811, it appeared that the defendant had conveyed the same land to the plaintiff by a prior deed, which contained the following clause:—"By this deed I mean to convey all the lands lying &c., of which A. S. died the owner, and which I claim by virtue of his last will and testament, being all the lands I own in the State of New York." On this deed was indorsed an unacknowledged deed of the plaintiff, dated June 5, 1811, which was as follows:—"Whereas the defendant has executed another deed of the same premises, to be delivered to me upon the assignment of this conveyance to him, I do therefore, in consideration thereof, reassign and convey to the defendant and his heirs, the within-described premises." It was *held*, that the plaintiff was not estopped by his deed to deny the defendant's seisin and right to convey.

A grantor conveyed a large number of lots of land, described as lying in a tract of wild land called the Boston Purchase. Among these lots were two described as "long lots numbered 15 and 43, containing 140 acres each, more or less," which were originally included in the surveys of the Boston Purchase, but which, it had been ascertained previously to the date of the deed, were adjoining thereto. It was *held*, that the words of the deed were sufficient to pass the two long lots; for the words of general description are controlled by the particular description.

Where a survey of land was made in pursuance of a resolve of the legislature of New York, and the plan was deposited in the office of the secretary of state, it was *held*, that a copy of the plan, verified by the oath of the surveyor, was competent evidence. But it seems that the original plan itself would not have been competent evidence, unless it had been thus verified.

So, a copy of a plan, alleged to have been filed in the office of the secretary of state of New York, by the persons under whom the party offering it in evidence claimed title, which was not verified by the surveyor's oath, was *held* incompetent evidence.

In an action brought in Massachusetts, upon a breach of the covenants of seisin and right to convey, where the land is situated in another State, the damages are to be assessed according to the rule adopted in Massachusetts.

In such action the measure of damages is the consideration paid, with interest from the date of the deed; but if the consideration cannot be ascertained, the value of the land at the time of the intended conveyance, with interest from the date of the deed, will be the measure of damages.

THIS was an action of covenant broken, brought by the plaintiff as administrator of Abiel Smith, deceased.

The covenants declared on were contained in a deed of the defendant to Abiel Smith, dated May 22, 1811, whereby he conveyed a large number of lots of land described as lying in a tract of wild land, called the Boston Purchase, in the State of New York, "the foregoing being the same and all the lands lying in the county of Broome, which were de-

Digitized by Google

Smith v. S. C. P.

vised to me by the will of Ashbel Strong." Among the lots so conveyed were two "long lots numbered 15 and 43, containing one hundred and forty acres each, more or less," which were situated north of the Boston Purchase and adjoining thereto.

The defendant covenanted that he was the true and lawful owner, and was lawfully seised, in his own right, of a perfect, absolute and indefeasible estate of inheritance in fee simple; that he had good right, full power and lawful authority to grant and convey; and that the grantee &c. should forever afterwards peaceably have, hold, occupy and possess, free from the hindrance or molestation of any person lawfully claiming the premises. The breaches alleged were in regard to the lots numbered 15 and 43, and were assigned by negativing the words of the covenants.

The defendant pleaded, that he was the true and lawful owner of the land, and was lawfully seised in fee, and had good right to convey, &c.; on which issue was joined, — with the agreement that the defendant might also avail himself of every defence which he might lawfully make, in the same manner as if such defence had been set out in a special plea.

At the trial, which was before *Wilde* J., the defendant produced a deed to himself from Abiel Smith, dated June 5, 1811, which was as follows: — "Whereas the within-named Strong has executed another deed of the same premises to be delivered to me upon the assignment of this conveyance to him, I do, therefore, in consideration thereof, reassign and convey to the said Strong and his heirs, the within-described premises." This was written on the back of a deed from the defendant to A. Smith, dated February 16, 1810. The latter deed, after a description of the same lots, contained the following clause: — "By this deed, I mean to convey all the lands lying in the county of Broome, &c., of which the late Ashbel Strong Esq. died the owner, and which I claim by virtue of his last will and testament, being all the lands I own in the State of New York." The plaintiff objected to the introduction of the deed of Smith as immaterial, and because it was not acknowleged. It was however admitted.

Digitized by Google

Smith v. Strong.

The defendant produced a deed from William Billings and Israel Williams to Ashbel Strong, dated September 17, 1803, of one half of the lot numbered 43. Also, a copy of the will of Ashbel Strong, dated December 17, 1808, by which he devised to the defendant all his lands situated in Broome county, containing nearly 4000 acres, and lying within the Boston Purchase.

The plaintiff produced an exemplification of an indenture between the commissioners of the States of New York and Massachusetts, dated December 15, 1786, by which New York ceded to Massachusetts the soil and right to a tract of land containing 230,400 acres, described as lying north and adjoining Cox and Hooper's line and between Owego and Chenango rivers, which was afterwards called the Boston Purchase. Also, a record copy of a resolve of the State of New York, passed March 22, 1805, whereby the surveyor general was directed to cause a survey of the tract to be made.

Also the deposition of James Geddes, a deputy surveyor appointed by the surveyor general of New York, to make a survey of the land, according to the provisions of the resolve. Geddes testified that, by the survey, which was made in 1805, he ascertained that the whole of the "long lots," including those numbered 15 and 43, were not within the limits of the tract ceded to Massachusetts by New York, although they had been included in the surveys of the proprietors of the Boston Purchase, who derived their title from the State of Massachusetts. Geddes annexed to his deposition a copy, testified by him to be a true copy, of the map made by him in pursuance of such survey, which was duly authenticated, the original having been filed in the office of the secretary of state of New York. The defendant objected to the admission of the plan, but the objection was overruled.

The plaintiff then produced an exemplification of an act of the State of New York, passed April 9, 1813, directing the surveyor general to sell the whole of the "long lots," and proved that the two lots in question had been sold, in compliance with the provisions of this act, to Asahel Saxton and William Talbot, who had entered and continued to hold possession of them.

Digitized by Google

The defendant then offered in evidence a copy of a plan alleged to have been made and filed in the office of the secretary of state of New York, by the proprietors of the Boston Purchase; but it was rejected on the ground, that it was not verified by the oath of the surveyor.

The jury found a verdict for the plaintiff, and assessed damages in the sum of $ 1500; that sum having been agreed upon, if the jury should find a verdict for the plaintiff, but subject to be enlarged, reduced or otherwise altered by the Court; and in case the Court should give judgment for the plaintiff, the depositions of John W. Hurlbert and others were to be referred to for the purpose of determining the amount of the damages.

April 5th

S. Hubbard and *H. Hubbard*, for the defendant, contended that the lots numbered 15 and 43, did not pass by the deed of the defendant; for they did not lie within the Boston Purchase and did not belong to Ashbel Strong, from whom the defendant claimed to derive his title. The deed purports to convey the same and all the lands lying in the county of Broome, that were devised to him by Ashbel Strong; now if the lots in question were not so devised to him, he does not covenant for the title. *Worthington* v. *Hylyer*, 4 Mass. R. 196; *Jackson* v. *Clark*, 7 Johns. R. 224; *Gascoigne* v. *Barker*, 3 Atk. 8; *Anon.* Dyer, 50. The plaintiff is estopped by the deed of the intestate, Smith, to deny the seisin of the defendant; for it refers to the first deed of the defendant, in which it is recited, that Ashbel Strong was the owner of the land, and that the defendant derived his title from him by devise; and the plaintiff is bound by this recital. *Alison* v. *Rankin*, 7 Serg. & Rawle, 269. This case is similar to *Bennett* v. *Irwin*, 3 Johns. R. 363.

As to the admissibility of the plan of the deputy surveyor, Geddes, they cited *Denn* v. *Pond*, Coxe's (N. J.) R. 379.

On the question of damages, they cited *Kane* v. *Sanger*, 14 Johns. R. 210; *Wilkinson* v. *Scott*, 17 Mass. R. 249; *Guthrie* v. *Pugsley*, 12 Johns. R. 126; *Leland* v. *Stone*, 10 Mass. R. 459. As interest is allowed on the damages on account of the mesne profits, it ought to be limited in general to six years; but no interest should be allowed here, where the subject of the covenant is wild land.

Digitized by Google

Smith v. Strong

Fletcher and *Bartlett*, for the plaintiff, on the question of estoppel, cited 1 Saund. Pl. & Ev. 43; *M'Crackin* v. *Wright*, 14 Johns. R. 193; *Jackson* v. *Hoffman*, 9 Cowen, 271; *Blanchard* v. *Brooks*, 12 Pick. 47.

To the point, that the general words used in the deed, were merely an additional description, and not a limitation of the grant, they cited *Powell* v. *Clark*, 5 Mass. R. 355.

On the question of damages, they cited *Marston* v. *Hobbs*, 2 Mass. R. 433; *Bickford* v. *Page*, 2 Mass. R. 455; *Sumner* v. *Williams*, 8 Mass. R. 162; *Nichols* v. *Walker*, 8 Mass. R. 246; *Chapel* v. *Bull*, 17 Mass. R. 213; *Horsford* v. *Wright*, Kirby, 3; *Caswell* v. *Wendell*, 4 Mass. R. 108; *Leland* v. *Stone*, 10 Mass. R. 459; *Nelson* v. *Carrington*, 4 Munf. 332. The covenant is personal, and the rule of damages in Massachusetts must therefore be adopted.

June 27th. WILDE J. delivered the opinion of the Court. Upon the facts reported, there can be no question that a breach of the defendant's covenant of seisin and title was well proved The defendant covenanted, that he was seised of a perfect, absolute and indefeasible estate of inheritance in fee simple, and he clearly had no such title; so that this covenant was broken on the delivery of the deed. He undertook to convey, and the grantee agreed to purchase, an indefeasible estate; and the defendant had no such estate to convey. The intended purchase, therefore, has wholly failed. Indeed it may well be doubted whether the defendant had any title sufficient to sustain a common covenant of seisin. He showed, it is true, a deed from Billings and Williams, purporting to convey a half of one of the lots, but there was no evidence that Billings and Williams were ever seised; and a deed from a stranger having no seisin, will not convey a seisin to the grantee. But it is not necessary to give any opinion on this point. It is sufficient for the plaintiff to prove that the defendant was not seised of the estate, and had not the title he undertook to convey. For although the issue was joined on the seisin of the defendant, and his right to convey, without adverting to the quality of the estate, and the plea is not a full answer to the breaches assigned, yet as the plea was filed by consent, with the reservation of a right

Digitized by Google

to give any special matter in evidence, the form of the issue is not material, and the finding of the jury and the judgment of the Court must conform to the merits of the case as proved on the trial. If then the evidence objected to by the defendant's counsel was rightly admitted, there can be no question that the plaintiff is entitled to judgment.

For there is clearly no foundation for the argument, that the plaintiff is estopped by the deed of Smith, the intestate, to deny the defendant's seisin and title. The object and legal effect of that deed cannot be misunderstood. It was merely to reassign all the title he had acquired under a prior deed from the defendant; it contained no warranty, and was equivalent to the cancelling of the first deed, thus restoring matters to the state they were in before that conveyance. Nor can it be maintained, that the two lots in question would not have passed by the defendant's deed if his title had been good, although they were not included in the general description of the granted premises, for the words of general description are controlled and rendered certain by the particular description of the two lots in question. And it is perfectly clear that these two lots were intended to be conveyed.

The only remaining question to be considered, except the question of damages, is, whether the evidence reported was competent evidence to go to the jury; and we are of opinion that it was. The copy of the plan annexed to the deposition of James Geddes, the surveyor, was proved by the deposition, and was in truth, by reference, made a part of the deposition.

The original survey or map was in the secretary's office in the State of New York, and the copy being verified by the oath of the surveyor, was properly admitted. If it had not been thus verified, it would clearly have been incompetent, and so would the original have been. The copy of a plan offered by the defendant's counsel was not thus verified, and was for that reason rejected, and as we think, rightly.

On the question of damages we have found it difficult to lay down any certain rule, it being hard to ascertain the value of the land at the time of the intended conveyance, or the price given by the intestate. If that could be ascertained,

Digitized by Google

Smith v. Strong.

it would undoubtedly be the proper measure of damages. But the opinion of witnesses, after such a lapse of time, will differ much as to the value of the land; and it is even more difficult to estimate the value of the notes which were given up to Hurlbert, as the consideration of the deed. It is not to be expected that on these points any additional and more satisfactory evidence can be obtained. Such being the intrinsic difficulty of ascertaining the actual consideration of the deed, we think the most certain rule of assessing the damages is, to take the price paid by Hurlbert to the defendant as the true value of the land. He was allowed one dollar per acre for the whole tract. There is no evidence that the lots in question are over or under an average value. So that we think one dollar per acre would be a fair estimate of the value of the land at the date of the defendant's deed. This amount, with interest from the date of the deed to the present time, the plaintiff is entitled to recover, as the defendant's covenant of seisin and title was broken on the delivery of his deed, and the intended conveyance has wholly failed.

Judgment for the plaintiff.

Digitized by Google

MATTHEW HUNT *versus* BENJAMIN CARD

The St. 1829, c. 2, subjects to the penalty of fifty dollars a person who, not having first obtained a commission or branch, shall undertake to pilot *any* vessel (other than those which are particularly excepted) into or out of the harbor of Boston, without regard to her draft of water.

As by the above-cited statute, American vessels engaged in the plaster trade between Boston and the province of Nova Scotia are not required to take a pilot, and as by the commercial arrangements between Great Britain and the United States, British vessels coming from the British colonies are admitted into our ports subject to no other duty of tonnage or impost or charge of any description whatever, than would be levied on vessels of the United States coming from such colonies, British vessels engaged in the plaster trade between Boston and Nova Scotia may lawfully refuse to take a pilot into or out of the harbour of Boston.

THIS was a *qui tam* action, founded on *St.* 1829, *c.* 2, § 1, which provides, that no person shall undertake to pilot any vessels, (fishing vessels, vessels bound to or coming from any port within the commonwealth, all vessels sailing under a coasting license, under two hundred tons burden, and all American vessels engaged in the plaster trade bound from any port within the province of New Brunswick, or Nova Scotia, excepted) into or out of the harbor of Boston, without first having obtained a commission, or branch, &c., under the penalty of fifty dollars for each offence. The declaration alleges, that the plaintiff was a branch pilot for the harbor of Boston, and that on October 23, 1831, he offered himself to the defendant, who was master of and on board of the schooner called the Traveller, of Halifax, she being required by law to take a pilot, to pilot her out of the harbor of Boston, but that the defendant refused to suffer the plaintiff to pilot her out, and proceeded to sea without the plaintiff.

The parties agreed that judgment should be rendered against the defendant, unless the Court should otherwise adjudge upon the following admitted facts;—1. That the Traveller was on the day of the refusal complained of, a British vessel belonging to the province of Nova Scotia, and actually engaged in the plaster trade from that province to Boston:—2. That the Traveller drew less than nine feet of water.

If on these facts the Court should adjudge that the defendant was not liable to the penalty of fifty dollars, a nonsuit was to be entered.

Digitized by Google

Hunt v. Card.

The cause was argued in writing.

Blair for the defendant. As the schooner Traveller drew less than nine feet of water, she was not bound to take a pilot. *St.* 1783, *c.* 13, § 2, 10; *St.* 1796, *c.* 85, § 2, 3, 5; *St.* 1819, *c.* 45, § 1; *St.* 1829, *c.* 2, § 1. The provisions in the previous statutes in regard to vessels drawing less than nine feet of water, are not expressly repealed by the last section of the statute of 1829, because this statute only provides that from and after July 1, 1829, no person shall undertake to pilot any vessel, except &c., and the repealing clause is not to take effect till the rules &c. are approved, &c.; which was done on February 12, 1830. The repeal, if any, is by implication; which is not allowed unless the repugnancy is plain. *Procter* v. *Newhall*, 17 Mass. R. 81; 6 Bac. Abr. 373, *Statute*, *D*; *Thornby* v. *Fleetwood*, 1 Com. Rep. 207; *S. C.* 10 Mod. 123. The statute of 1829 and the previous ones are to be construed together, and in such manner as may give effect to each. Now if the provision, that from and after July 1, 1829, no person &c. shall undertake to pilot *any vessels*, under a penalty of fifty dollars, should be construed to mean *any such vessels* as were by the previous acts bound to take a pilot, then this penalty might be enforced when the act went into operation, on July 1, 1829. But if it is construed to mean all vessels except those expressly exempted in the statute of 1829, then 1. this penalty cannot be enforced against vessels drawing less than nine feet, because by the provisions of the previous acts they were not bound to take a pilot, and these provisions were not repealed by the last section of the act of 1829, when it went into operation, on July 1, 1829;— 2. The previous acts authorized the fees of pilotage to be fix only for vessels drawing nine feet or more, and therefore th penalty would be imposed when no pilot was authorized to tak charge of the vessel or demand fees;—and 3. It would l imposed on vessels which are not bound by any statute to tak a pilot, such as ships of war, half deck vessels of five tons and under, &c. *United States* v. *An Open Boat &c.*, 5 Mason 120. If this penalty could not be enforced when the act o. 1829 by its express terms went into operation, it could not be afterwards. *Boat Eliza &c.*, 2 Gallis. 4.

Digitized by Google

2. All *American* vessels engaged in the plaster trade from any port within the province of New Brunswick or Nova Scotia, are, by the statute of 1829, exempted from the charge of pilotage; and by the commercial arrangements made between Great Britain and the United States, British vessels are subject to no higher or other duties or charges in any of the ports of the United States, than those payable in the same ports by vessels of the United States. See the convention to regulate commerce between the territories of the United States and Great Britain, of July 3, 1815, in Laws of U. S. *Vol.* 6, *p.* 603, and Gordon's Dig. 183; Act of Congress of May 29, 1830, (*c.* 208, § 1); the arrangement between the United States and Great Britain, made by Mr. M'Lane and Lord Aberdeen, the president's message, of January 4, 1831, the president's proclamation, of October 5, 1830, and the circular letter of the secretary of the treasury to collectors of the customs, of October 6, 1830, in Senate Documents, of 21st Congress, 2d Session, *No.* 20; Constitution of U. S. *art.* 6. Pilotage is a *charge* on the vessel. *St.* 1796, *c.* 85, § 12; *The Anne*, 1 Mason, 508.

D. A. Simmons and *Gay contrà*. Before the *St.* 1829, *c.* 2, vessels drawing less than nine feet were not obliged to take a pilot; but this statute was intended to establish a new system; and all the provisions of former statutes inconsistent with this statute are repealed, from and after the approval by the governor and council, of certain rules for the regulation of pilots. Such approval took place in February, 1830, long before the defendant's refusal to take a pilot, as alleged in the declaration, and whether a period existed in which the old system was not in full force nor the new one perfected, is therefore immaterial. *Goodenow* v. *Buttrick*, 7 Mass. R. 140; *Bartlett* v. *King*, 12 Mass. R. 545; *Nichols* v. *Squire*, 5 Pick. 168; *Ellis* v. *Paige*, 1 Pick. 45.

The *St.* 1829, *c.* 2, and the rules &c. made in pursuance of it, in no degree conflict with the intent of the convention of 1815, the act of congress of May 29, 1830, or the arrangement made by Mr. M'Lane and Lord Aberdeen. Neither congress, nor the parties to the convention and arrangement, had any reference to the matter of pilotage. By the act of con-

Digitized by Google

Hunt v. Card.

gress of August 7, 1789, (*c.* 9, § 4,) it was provided in express terms, that this subject should be regulated by the several States, and this was well known to both of the contracting parties. By the *duties* and *charges* mentioned in the act of congress of 1830, and in the convention and arrangement, must have been intended the duties and charges imposed by the government of the United States, and nothing more.

June 27th. PUTNAM J. delivered the opinion of the Court. By the *St.* 1783, *c.* 13, § 2, every branch pilot, being commissioned &c., is empowered and directed to take charge of any vessel or vessels drawing nine feet of water and upwards, bound into the port of Boston. By § 10, outward bound vessels drawing nine feet of water and upwards, are under the same regulations. But coasting and fishing vessels are excepted from the operation of the statute. The governor and council were authorized, by § 5, to fix the fees of pilotage.

The *St.* 1796, *c.* 85, § 2, provides that no person shall undertake to pilot any vessel drawing *nine feet of water or more*, into or out of the harbor of Boston, without having obtained a commission or branch, &c. under penalty of fifty dollars. But there is a provision in § 8, that any master of a vessel from a foreign port who may choose to hazard the pilotage of his vessel into the harbor, may do so, paying half fees to the pilot who shall first offer his services.

By *St.* 1819, *c.* 45, § 1, any master of a vessel drawing nine feet of water and upwards, may pilot his own vessel, under certain provisions; but coasters and vessels without registers, and all American vessels engaged in the plaster trade, bound from any port within the province of New Brunswick or Nova Scotia, are excepted from those provisions.

By the acts cited, vessels drawing *less than nine* feet of water are not obliged to take a pilot. The obligation is upon those which draw nine feet or more; excepting coasters, and vessels without registers, and all American vessels engaged in the plaster trade. These regulations continued ten years; when the *St.* 1829, *c.* 2, § 1, enacted, that no person or persons should undertake to pilot *any vessel* (fishing vessels, vessels bound to or coming from any port within the commonwealth, all vessels sailing under a coasting license, under two

Digitized by Google

hundred tons burden, and all American vessels engaged in the plaster trade bound from any port within the province of New Brunswick or Nova Scotia, excepted) into or out of the harbor of Boston, without having obtained a commission or branch, &c., under the penalty of fifty dollars, to be recovered, &c. The 3d section authorizes the governor, with the advice of the council, to commission branch pilots, on the recommendation of the trustees of the Boston Marine Society; and the trustees are authorized to establish rules for fixing the duties of the pilots, and the fees for their services. And the 5th section repeals all acts and parts of acts inconsistent with that which was then passed.

This action is brought to recover the penalty of fifty dollars, against the defendant, the master of the schooner Traveller, for refusing to take a pilot according to the first section of the act of 1829, before cited.

The Traveller, on the 23d of October, 1831, the time of the refusal complained of, was a *British* vessel, belonging to the province of Nova Scotia, engaged in the plaster trade from that province to Boston. She is not within the exception of the statute of 1829, for by that act, *American* vessels only, engaged in that trade, are exempted.

But the Traveller drew less than nine feet of water; and it is contended for the defendant, that such vessels (not being obliged to take pilots in virtue of the acts relating to pilotage before 1829) were not intended to be included in the latter act; that according to the true construction of the act of 1829, by the words *any vessel*, should be intended, any vessel which by the provisions of the prior acts was required to take a pilot, and as any vessel which drew less than nine feet of water, was not bound by the prior acts to take a pilot, such vessels are not by the last act obliged to do so. But we cannot yield to this construction. The provisions of the acts before 1829 were applicable only to vessels which drew more than nine feet. The act of 1829 extends to any vessel (excepting such as are particularly excepted) without any regard to or notice of their draft of water. They are inconsistent, and the latter statute is to prevail.

It is argued, that if the act of 1829 be construed to extend,

Digitized by Google

Hunt v. Card.

without limitation, to any and all vessels, it would embrace vessels not bound to take a register, &c. It may be that some inconvenience may happen from the supposed unintentional omission of the exemption contained in the former acts, of vessels drawing less than nine feet. It is for the legislature, and not for us, to apply the remedy, if any alteration is necessary.

But we are all satisfied, upon another ground, that the Traveller, being a British vessel in the *plaster trade between the province of Nova Scotia and Boston*, was not obliged to take a pilot, at the time when the defendant refused to do so, because British and American vessels were then by treaty and commercial arrangements between Great Britain and the United States, placed upon the same footing with each other, in relation to this matter.

We have seen that by the statutes of Massachusetts all *American* vessels engaged in the plaster trade aforesaid, are exempted from the charge of pilotage.

On October 5, 1830, our ports were opened to *British* vessels *coming from British colonial possessions, and their cargoes*, subject to no other duty of tonnage or impost, *or charge of any description whatever*, than would be levied on vessels of the United States arriving from the British possessions. This national arrangement was announced in the proclamation of the president of the United States, on October 5, 1830.

But it is contended by the plaintiff, that the subject of pilotage was not embraced in the commercial arrangements between Great Britain and the United States, but, that by the laws of the United States, this matter of pilotage is left to the regulation of the several States. If this be so, the conclusion would not follow; for treaties are paramount to the laws of the States; Const. U. S. *art.* 6; and we think that pilotage is to be considered as a charge upon the vessel. *The Anne*, 1 Mason, 508. The laws of the States must be considered and taken to be controlled by and subject to treaties, and the laws of the United States made conformably thereto.

The arrangement between the two countries before referred to, became the supreme law of the land, of which all Judges of the United States, and of the several States, were to take

Digitized by Google

notice. After it was promulgated, it was not for the State of Massachusetts to counteract its provisions, and continue to say that British vessels in the plaster trade between Nova Scotia and Boston should be subjected to the charge of pilotage, but that American vessels in the same trade should be exempted therefrom.

It is upon this ground that we are all of opinion that the plaintiff should become nonsuit.

WILLIAM EAGER *versus* THE ATLAS INSURANCE COMPANY.

In adjusting a partial loss on a ship which has been repaired, the proceeds of the old materials not used in the repairs, are first to be deducted from the gross expenses of the repairs, and then the deduction of one third new for old is to be made from the balance.

A usage at a particular place to make the deduction of one third new for old from the gross amount of the expenses of repairs, cannot control the above-stated general principle of law, in the construction of a policy containing no reference to such usage.

Such usage moreover is unreasonable and cannot be sustained, because it is opposed to an established rule of law, and to the essence of the contract of insurance, which is a contract of indemnity.

ASSUMPSIT on a policy of insurance, dated October 28, 1828, on the ship Grecian, to recover for a partial loss.

Upon a case stated it appeared, that the ship was injured by getting on shore at Liverpool, and was repaired. The loss was settled before the institution of this suit, by a compromise, in which the underwriters assumed the right of deducting the one third new for old from the gross amount of the loss, but it was agreed by both parties, that if this adjustment was erroneous in point of law, the plaintiff should recover a further sum of $226·87, and interest, this sum being the difference, if the deduction ought to have been made from the net amount of loss after deducting the value of the materials saved.

It was agreed for the purposes of this hearing, that at the time of the underwriting of the policy and of the happening of the loss, it was the usage of the insurance offices in Boston

Digitized by Google

Eager v. Atlas Ins. Co.

(the place where this policy was underwritten) to make the deduction in the manner in which it was made in the compromise above mentioned.

The policy is in the form adopted in 1823 by all the insurance offices in Boston, and it contains the following clause:—"Touching the adventures and perils which the said company are contented to bear, and take upon them in this voyage, they are, of the seas &c. and all other losses and misfortunes which have or shall come to the damage of the said ship or any part thereof, *to which insurers are liable by the rules and customs of insurance in Boston*; provided" &c. The clause italicised was not contained in the policy, underwritten at Salem, in the case of *Brooks* v. *The Oriental Insurance Company*, 7 Pick. 259.

If on these facts the plaintiff was entitled to recover, judgment was to be rendered on a default, for the sum above mentioned and interest.

April 6th. The case was submitted to the Court upon the opinions of Benjamin R. Nichols, published in the American Jurist, *vol.* 5, *p.* 262, and of Willard Phillips, published in the American Jurist, *vol.* 6, *p.* 45, supporting the ground taken by the plaintiff;—and the opinion of Charles Jackson (formerly a justice of this Court) published in the American Jurist, *vol.* 5, *p.* 252, and a written opinion of William Prescott, on the other side of the question; also, *Byrnes* v. *National Ins. Co.* 1 Cowen, 265; *Dickey* v. *New York Ins. Co.* 4 Cowen, 222, 245; 3 Kent's Com. 283; *Brooks* v. *Oriental Ins Co.* 7 Pick. 259.

S. Hubbard, for the plaintiff.

Fletcher and *Cooke* for the defendants.

June 27th. WILDE J. delivered the opinion of the Court. This case is submitted to our consideration, upon an agreed statement of facts, for the purpose of obtaining a revision of one of the points decided in the case of *Brooks* v. *The Oriental Insurance Company*; and as that decision was made without a very full discussion, though certainly not without consideration, we have very willingly reëxamined the subject. But after fully considering the arguments and opinions to which we have been referred, in which the question is discussed with great ability:

Digitized by Google

and after due deliberation, we have been unable to perceive any sufficient reason for overruling our former decision; on the contrary, a more close and thorough examination of the principles and the reasons of that decision has rather tended to strengthen and confirm our confidence in its correctness.

The question to be reconsidered is, whether in adjusting a partial loss on a vessel, after repairs made, the deduction of one third from the whole expenses of the repairs is to be made, for the substitution of new materials and work for old; or whether the proceeds of the old materials not used in the repairs should be first deducted, and the one third be taken from the residue.

Another question arises from the facts agreed, which was not considered in the case of *Brooks* v. *The Oriental Ins Co.*, and which depends on the usage of the insurance offices in Boston, and "the rules and customs of assurance" referred to in the policy. This question, if determined in favor of the defendants, will be decisive, and we have therefore attentively examined the grounds on which it appears to us to depend. The result of the examination I will now briefly state.

It is agreed by the parties, that at the time of the underwriting the policy, and at the time of the loss, it was the usage of the insurance offices then existing in Boston, in adjusting a partial loss, to deduct one third new for old from the gross amount of the expenses of repair. And it appears by the policy, that in the clause enumerating the perils insured against, after specifying the seas, fire, enemies, &c., there is added, "and all other losses, and misfortunes, which have, or shall come to the damage of the said ship, to which insurers are liable by the rules and customs of insurance in Boston." The defendants' counsel contend that this clause in the policy, coupled with the usage before stated, must so control the construction of the contract, as to settle the present question in their favor, whatever may be the general rule of law as to the adjustment of similar losses in other cases.

That a local usage, as well as general usages of trade, may materially affect the construction of a contract, cannot be denied; but to have this effect such usage must appear to be so well settled, and of so long a continuance, as to raise a fair

Digitized by Google

Eager v. Atlas Ins. Co

presumption that it was known to both contracting parties, and that the contract was made in reference to it. Such a presumption is the only basis, on which any local or particular usage can be sustained, so as to affect the construction of a contract. The usages or customs of particular places are not binding, unless the parties contract in reference to them, and if their agreement be reduced to writing, the reference ought to appear by the terms of the contract. To allow particular usages to control or vary the construction and legal effect of a written contract, would be repugnant to the rules of evidence, and might be followed by perilous and mischievous consequences. Courts take no notice of these local and particular usages; they are to be proved like other facts, and necessarily by parol evidence. *Gordon* v. *Little*, 8 Serg. & Rawle, 557; *Snowden* v. *Warder*, 3 Rawle, 103; *Smith* v. *Wright*, 1 Caines's R. 44. But if parol evidence were admissible, and particular usages might control or vary the construction of a written contract, an insuperable objection to the defence, so far as it depends on the question of usage, would remain. For whatever may have been the usage, and however well known, it can have no effect on the contract, unless it was adopted by the parties, and the contract was made in reference to it; of this there is no proof, nor ground of presumption; on the contrary, the terms of the contract strangely rebut any such presumption. It has been already remarked, that the rules and customs of insurance in Boston are expressly referred to in the policy, but for a purpose foreign to the present question. That reference was introduced for the purpose of designating the perils insured against, and of supplying any omission in the list of those which are enumerated; but it has no relation to the mode of adjusting a partial loss. There are stipulations in the policy touching partial losses, but none in respect to the question now to be considered This question had been settled in New York years before this policy was underwritten, and for some time before had been pending in this Court for decision. From these and other circumstances the presumption is strong, that the parties did not treat, as to the mode of adjustment, on the basis of usage, but on that of the existing law, however it might be decided

Digitized by Google

When the contract refers to "the customs and rules of insurance in Boston," and specifies how far they shall constitute a part of the contract, it must be inferred that the parties did not intend that it should be affected thereby beyond the extent specified; especially as the form of the policy was no doubt settled and adopted with great care and deliberation.

These considerations appear to us quite sufficient to settle the question of usage, but other considerations might be added if necessary. The usage relied upon by the defendants is opposed to the essence of the contract of insurance, which is a contract of indemnity. That the usage, if applied to the contract, would deprive the insured of a full indemnity, and give to the underwriters an unreasonable advantage, I shall endeavour to show in discussing the principal question. The usage is also opposed to the rule of law, as we understand it, by which partial losses, when vessels have been repaired, are to be adjusted.

The rule of deducting one third new for old probably originated in usage, but it has been long known and settled in the commercial world, and has been adopted by courts, so that it is now a well settled principle of law. Now it seems to me very clear, that no particular usage opposed to the established principles of law, can be sustained. And so it was decided in the case of *Homer* v. *Dorr*, 10 Mass. R. 26. The insurance was on property laden on freight from Boston to Archangel and back to Boston, taking the risk on shore as well as on board. In an action on the premium note it was held, that the whole note was recoverable, although no property was returned in the ship; and it was proved to be the universal usage in Boston, where the insurance was effected, to return a portion of the premium in such cases. Again, if local usages are to be admitted to control the rule in question, the object and intention of the rule will be defeated. It was adopted for the sake of convenience, and to avoid the difficulty of ascertaining the relative value of the new and old materials; but there would be less difficulty in ascertaining this, than there would be to settle the various usages that might spring up in different ports, if every local usage were allowed to control

Digitized by Google

Eager v. Atlas Ins. Co.

the principles of law. In Boston the one third new for old might be deducted from the gross expenses of repair; in Salem the proceeds of the old materials might be first deducted; and in some other port some other modification might be introduced, either by increasing or diminishing the rate of deduction, so that we might have as many different usages and laws as there are ports in the commonwealth. Instead, therefore, of having a simple, certain and convenient rule for our guide, we should have to consult and ascertain these local usages; and to conform to the various changes and fluctuations in them which circumstances might from time to time introduce. These local usages may be useful, and are admitted, to explain the intention of parties, where there is reason to presume that the contract was made in reference to them; but to suffer them to prevail so as to sap the foundation of a well established rule of law, would be going too far. In the present case, however, it is not necessary to determine how far particular usages may be binding, or explanatory of contracts, or of the rules of damages; it is sufficient to decide, that they can have no effect upon any contract, unless by the consent of the contracting parties, either express or implied. No such consent appears in this case, and it cannot be presumed, for the reasons already stated; and this seems to be decisive as to the question of usage.

The remaining question is more important, and more involved in doubt and difficulty. The arguments and opinions opposed to the decisions in *Byrnes* v. *National Ins. Co.* 1 Cowen, 265, and in *Brooks* v. *Oriental Ins. Co.* 7 Pick. 259, which have been recently published, are undoubtedly entitled to great consideration; still however we continue to think that those decisions are sustained by the most weighty and convincing reasons.

All agree that the contract of insurance is one of indemnity, and that this is in truth the essence of the contract. The assured are entitled to a full indemnity from the underwriters, and nothing more. That rule therefore is the best, which will, in the settlement of a loss, most fully and exactly fulfil this principal intention of the contract. It is also admitted.

Digitized by Google

that the rule of deducting one third new for old, however construed, will not always secure an exact indemnity. The assured will recover more or less than an indemnity, according to the age and state of the vessel before the loss, but this imperfection of the rule is supposed to be more than compensated by its certainty, simplicity and practical convenience. Before the introduction of the rule, the relative value of the new and old materials was ascertained by appraisement in each case; and the difference between the cost of the new materials and work, and the value of the old materials at the time of the loss, was deducted, leaving the balance for which the insurer was liable. This being found inconvenient, and it being difficult to ascertain the value of the old materials with accuracy, the rule of deducting one third new for old was long since substituted for the ancient mode of adjustment, and its continuance for such a length of time proves its practical utility. Since the introduction of the rule neither party can question the relative value of the new and old materials, whether the rule in a particular case should afford an exact indemnity or not. Thus far the parties are bound by the rule, but no further. This, like all other general rules, when applied to a multiplicity of cases, will not always do exact justice, but it should be so applied as to do as little injustice as possible. It will not do to say, that because a rule of necessity produces some unjust results in particular cases, it should be so applied as to produce other similar results without necessity; and that such must be the effect of the rule contended for by the defendant's counsel, cannot, we think, well be doubted.

Let us suppose, for example, that the vessel parts her cable in a storm, but that a part is saved which is sold for $200, and that a new cable is purchased which costs $300. If one third is deducted from the full price of the new cable, this balances the account, and the assured is entitled to no indemnity. If the part of the old cable saved should sell for $250, the assured, in stating an account, would become indebted to the underwriters $50, and so whenever the old materials sell for more than two thirds of the amount of the expenses of

Digitized by Google

Eager v. Atlas Ins. Co.

repairs, a balance will be found in favor of the underwriter. Whether he can claim it or not is not the question; nor is it any good answer to the objection resulting from the unjust operation of the rule, to say that such cases will but rarely occur; for a result so unjust, and so manifestly opposed to the spirit of the contract of insurance, ought never to occur. But without supposing extreme cases, it seems to me that generally the assured will not receive full indemnity, if a third new for old is to be deducted from the whole expenses of repairs, without first deducting the salvage. The salvage is no part of the loss, and belongs to the assured; the amount of that, therefore, ought to be withdrawn from the operation of the rule, or the assured will fail to recover a full indemnity. It is said that the assured, by such a rule, would recover more than an indemnity, and that injustice would be done to the underwriter. For instance, if the expenses of repairs amount to $600, and the old materials sell for $200, then it is said the assured would be fully indemnified by the recovery of $200, the increased value by the new materials being $200, as assumed by the rule; whereas by first deducting the proceeds of the old materials, and then deducting one third from the residue, the assured would recover $266·67, — being $66·67 more than a full indemnity. But there is a fallacy, we think, in this objection and statement.

It is true that the vessel is made better by the repairs; but it by no means follows that the whole amount of the increased value is to be credited to the underwriter. So far as he contributes to the expenses of the repairs he should be credited for the increased value, but no further. Now the underwriter has no concern with the expenses of repairs which are defrayed by the old materials. So far as these go the subject repairs itself, and thus far there is no claim for indemnity. The further disbursements required to repair the loss, are to be made at the expense of the underwriter, and on these expenses he is entitled to a deduction of one third; but there seems to be no good reason for extending the rule beyond these limits.

In the case last supposed the adjustment would be thus stated

Digitized by Google

Whole expenses of repairs, - - - -	$600·00
Deduct expenses paid by the proceeds of the old materials, those being the property of the assured - - - - - - - -	200·00
	400·00
The remaining disbursements being made at the expense of the underwriter, he is entitled to a deduction of one third new for old	133·33
And he is chargeable with the - - - -	$266·67

Which gives generally to the assured a full indemnity, and no more. There may be some exceptions, but in adopting a general rule of decision we are to look at general results.

But it is denied that the old materials are the property of the assured; it is however difficult to conceive how and when, before the adjustment of the loss, the property in the assured becomes devested and vested in the underwriter. It is said that if the underwriter pays the full amount of the loss, the old materials become his property; that if a cable is lost, and afterwards the loss is adjusted and the underwriter pays, the old cable if recovered would become the property of the underwriter. And so if part of a cargo is lost, and the loss is paid by the assurer; the lost articles if recovered would belong to him. This may well be admitted, without affecting the question under consideration, for until an adjustment is made the old materials continue to belong to the assured, and if they are disposed of, and the proceeds are applied to the purchase of new materials, the underwriter, as to that part of the expenses of the repairs, can have no claim to an allowance for the increased value. The repairs made by means of the salvage constitute no part of the loss, and cannot be charged against the insurer; the old materials therefore clearly belong to the assured.

But a weightier objection to our former decision remains to be considered. It is said to be immaterial to whom the old materials belong, or who pays the disbursements for repairs, because at all events the ship is made one third better by the repairs, and therefore one third of the gross expenses

Digitized by Google

Eager v. Atlas Ins. Co.

should be deducted, or the assured will receive more than an indemnity. And this would be true, if the fact were that such would be in all cases the increased value, or if the presumption is to be carried to the extent the objection supposes. But presumptions against facts, established for convenience, are to be strictly guarded, and a rule founded on such presumptions is to be confined to the purposes for which it is adopted. Now it has been already remarked, that the rule in question was adopted to avoid the difficulty and uncertainty of ascertaining the loss, and the amount of indemnity therefor, by appraisement in each particular case. This rule was founded on the supposition or presumption, that generally the new materials are one third better than the old. The question then is, how far this presumption is to be carried out, and to what portion of the repairs the rule is to be applied. We understand the rule to be, that one third is to be deducted from the expenses of repairing the loss, and that the loss is the injury done to the vessel which remains after the proceeds of the old materials have been applied. This is the loss against which the underwriter stipulates to indemnify the assured, and so it was considered before the introduction of the existing rule. 1 Magens, 193. The rule, therefore, and the presumption as to the relative value of the materials, are to be confined to the portion of the repairs remaining after crediting the old materials. These go to reduce the cost of repairs, the underwriter being only chargeable with the difference between the proceeds of the old materials and the cost of the new, and the amount of the difference is the amount paid to repair the loss, on which the deduction of one third new for old is to be made.

This on the whole, as we think, is much the most equitable rule of adjustment, and best adapted to secure, as nearly as any general rule can, exact indemnity; and commonly it will not be found too favorable to the assured; whereas the rule contended for by the defendants might lead to injustice, and even absurdity; or to a train of exceptions which might be very embarrassing.

Judgment for the plaintiff

Digitized by Google

JOHN JACKSON *versus* NATHAN HALL.

In assumpsit, the defendant, under the provisions of *St.* 1793, *c.* 75, § 4, filed a set-off, which merely stated, that the plaintiff was indebted to the defendant for "the amount of account *due as per books*, $ 10,000." It was *held*, that this was a sufficient "account," within the meaning of the statute, the object of such account being only to put on record notice to the plaintiff, that the defendant intends to avail himself of such set-off; and that if the plaintiff is at a loss to understand from the set-off, what demands the defendant intends to offer in evidence, he may have specific information by a bill of particulars.

In the same action, the defendant, upon being required by the plaintiff, filed a bill of particulars of such set-off, among the items of which were three promissory notes of the plaintiff. It was *held*, that the defendant was limited by the words of the set-off, to such demands as were entered in his books, and that, as these notes were not shown to be so entered, evidence of them was inadmissible in set-off.

Where a defendant, upon being required by the plaintiff, filed a bill of particulars of his account in set-off, and the plaintiff allowed it to be filed, and the evidence on the part of the defendant to be taken, without making any objection, it was *held*, that he was not thereby precluded from objecting at the trial to the admission of proof of claims specified in the bill of particulars, but which were not embraced by the account filed in set-off.

ASSUMPSIT. The writ was dated September 5, 1832. The declaration contained four counts on promissory notes, and a count for money had and received.

On September 25, 1832, the defendant filed in the clerk's office of the Court of Common Pleas, a term of which court commenced on October 2, next ensuing, a set-off in the following words: —

"Mr. John Jackson to Nathan Hall, Dr.

1832, September 25. To the amount of account due *as per books* - - - - - - - $ 10,000."

The defendant, on January 15, 1833, during the term of this Court in which the action was tried, upon being required by the plaintiff, had filed a bill of particulars of the set-off. The bill of particulars consisted of several items of large sums of money paid by the defendant for the use of the plaintiff, in December, 1831, amounting to $ 2676·67, and of three promissory notes made by the plaintiff to the defendant, one dated April 21, 1828, for 40 dollars, another dated April 23, 1829, for 100 dollars and interest, and the third, dated February 1, 1831, for 100 dollars.

The defendant pleaded the general issue, which was joined

Digitized by Google

Jackson v. Hall.

At the trial, before *Wilde* J., the plaintiff objected to the original set-off as uncertain and imperfect, and as not being a sufficient "account" of the demands of the defendant, within the meaning of *St.* 1793, *c.* 75, § 4. He objected to the bill of particulars, as being composed of items which could not be comprehended in the terms of the original set-off, even if that set-off should be adjudged sufficient. He also objected to the defendant's evidence, because the items to be proved were not shown to be in or due by the books of the defendant.

These objections being reserved for the consideration of the whole Court, the defendant was permitted by the judge to proceed and offer evidence in support of the items in the bill of particulars. In the course of the trial the defendant was called on by the plaintiff to produce his books; but he did not comply with this demand.

The jury found a verdict for the defendant. The plaintiff moved for judgment, *non obstante veredicto*; or for a new trial, because of this ruling of the judge, and because the verdict was against the evidence.

The case was argued in writing.

Bartlett for the plaintiff. The original set-off is wholly insufficient; the plaintiff could not understand as much from the "account" filed in this case, as he could have done from the common counts. These specify at least the nature of the claim. But here the words of the original set-off might mean, either every thing that the defendant had chosen to put on his books during an indefinite period, whether properly the subject of book-charge or not, or they might mean such items as may be proved by the books and oath of the party. The word "account" in the statute was used in its popular sense, as signifying *bill of particulars* or *specification*, and the design of the statute was, that the plaintiff should have seven days' notice of the nature of the claims made by the defendant.

We contend that even if the original set-off was sufficient, yet that the bill of particulars *is not, on the face of it*, for the same cause of action. The items relating to promissory notes, cannot be comprehended in the words of the original set-off, even if they were in fact entered on the books; and

Digitized by Google

no attempt was made by the defendant, in the course of the trial, to connect these charges with his books.

But if the bill of particulars could be filed under the original set-off, still the defendant was bound to produce his books at the trial, and to prove that the items were inserted therein. It might fairly be urged, that the defendant was confined by the terms of the original set-off, to such items as may be proved by the books and oath of the party; but however that may be, it is manifest that he should be limited to charges entered on his books, otherwise the plaintiff is altogether without protection. The books, if produced, might have furnished an answer to these claims.

It is said that the plaintiff, by calling for a bill of particulars, not objecting to it when filed, permitting the defendant to take his evidence, and procuring evidence himself, waived all right to object either to the set-off or the bill of particulars. We answer, that if a set-off be, as is contended, in the nature of a declaration in a cross action, it is a new doctrine, that an exception to such declaration comes too late after the evidence is taken, or after the party has been called on for a bill of particulars. In this case, how and when could the question of the validity of this set-off be raised for the adjudication of the Court, except at the trial? If it could only be raised at the trial, was the plaintiff bound to rest his case on that point only, without preparing himself in case the Court should decide it against him? If then such preparation be not a waiver of the right to object, how could the plaintiff prepare himself without ascertaining from the defendant what he intended to prove under the words "amount of account due as per books"? It is obvious, that after having obtained this explanation by a bill of particulars, the plaintiff could not have raised the objection that it was not for the same cause of action, except at the trial.

Hoar for the defendant.

SHAW C. J. delivered the opinion of the Court. *June 27th*

Two objections were made to the account in set-off filed in this case, somewhat repugnant to each other; of which one is, that the account in set-off is too general and gives the plaintiff no notice of the demands, actually relied on; and the other.

Digitized by Google

Jackson v. Hall.

that it was not general and broad enough in its terms to cover the actual demands embraced in the bill of particulars and of which proof was offered at the trial.

The first objection, we think, cannot be sustained. The object of the law in allowing a set-off, is to enable a party defendant not merely to give in evidence matter which goes to disprove the plaintiff's demand, or to prove payment or other matter in discharge, but to enable him to avail himself of independent demands which he has against the plaintiff, and which would be the proper subject of an action. But to avail himself of such cross demands, the statute requires, that he shall file an account of such demands, seven days before the time of trial. *St.* 1793, *c.* 75, § 4. The sole object of such "account" seems to be, to put on the record notice to the plaintiff, that the defendant intends to avail himself of such set-off. The account is in the nature of a declaration, and, like a declaration, may be expressed in the most general terms. There is no particular form, however, in which such account is required to be stated. The doctrine of set-off is founded on the broadest principles of equity, tending to prevent circuity of action, and to settle various controversies in one suit. The Court therefore would be cautious about excluding an account in set-off for generality, because if a plaintiff is really at a loss to understand what demands the defendant intends to offer, and wishes for more specific information he may have it by the aid of a bill of particulars.

But the real difficulty in this case, is of an opposite kind, namely, that the account in set-off, general as it is, does not embrace the demands given in evidence under it.

I have said, that the account is like a declaration, except that no particular form is required. Let us compare them in this respect. A declaration may be extremely general, as for money had and received, paid, lent and advanced, and for goods sold; but on such a declaration the plaintiff could not offer evidence of a bond, judgment or other specialty, or for services done. Here, we think, the demands offered are excluded by the description in the account. The account is, "amount of account *due as per books.*" These last words cannot be excluded as surplusage; they are part of the de-

Digitized by Google

scription and limit it to demands, in some way or other contained in the defendant's books. Perhaps it would be too much to hold, that it is to be confined to charges proveable by books, or to cash, merchandise or services usually charged on books, and commonly known as book accounts; and if it had been the usage of the parties, in their dealings, to charge or otherwise enter their notes on book, the description might have been sufficient to embrace them. But the books, though called for, were not produced, and it was not suggested for the defendant, that the notes offered were entered on his books. We are, therefore, of opinion, that these demands ought not to have been admitted to proof, under this account, and that there must be a new trial.

But it is said that by receiving the bill of particulars without objection, the plaintiff waived the objection now made. Had the objection been to the sufficiency of the bill of particulars, there would be great force in the argument; it would, I think, be decisive. But the objection is, that whether specified in the bill of particulars or not, the defendant offered evidence of claims, which he had not put upon the record. To refer again to the analogy between an account in set-off and a declaration. The plaintiff has a single count, for money had and received, the defendant requires a bill of particulars, and the plaintiff files one including charges for goods sold and services done. Will he be allowed to prove these demands under that count on the ground that the defendant should have excepted to his bill of particulars, and not doing so, will he be deemed to have waived his right to object to proof of these demands on the trial? The objection is founded upon the maxim, which lies at the foundation of all judicial proceedings, that a party's *allegata* and *probata* must correspond; the want of this conformity goes to the merits, and the time for making the objection is at the trial.

New trial granted.

Digitized by Google

TOBIAS LORD *versus* JOHN S. TYLER *et al.*

In an indenture between the plaintiff as agent of M. of the one part, and the defendants and one T, since deceased, of the other part, reciting that the plaintiff, as such agent, had, with the consent of T, sold a schooner to B, one of the defendants, for $ 1950, of which sum $ 950 had been paid to the plaintiff, and that T claimed to own a moiety of the schooner, the defendants and T covenant that they will pay the plaintiff $ 1000, the residue of the price, within one year, subject to the proviso, that if T shall within one year, by any legal process or arbitration that may be agreed upon between the parties, legally establish his title to such moiety, then the $ 1000 shall not be paid, and subject to the further proviso, that if at the end of one year any process for the purpose of determining the title of T shall be depending, then the payment shall be delayed until such process shall be determined, and if by the termination of such process it shall be found that T was the owner of a moiety, the $ 1000 shall never be paid. In an action of covenant on this indenture the plaintiff avers, that T did not, within one year, by any legal process or otherwise, establish his title, and that no process was depending and undetermined at the end of the year. The defendants plead, that T and the former master of the schooner were owners, as tenants in common, each of an undivided moiety, that the master sold her without authority to G, that G sold her to M, and that the plaintiff as M's agent sold her to B; that before this last sale T claimed a moiety as tenant in common with M, and that the indenture was entered into for the purpose of determining their conflicting claims; that T, in his lifetime, and since his death his administrator, offered to the plaintiff, within the year, and were always ready, to agree in the appointment of arbitrators or the commencement of any legal process, but that the plaintiff refused. It was *held*, that as T claimed to be tenant in common with M, no adverse suit could be brought to determine their respective rights; that the fair construction of the indenture was, that whether the controversy should be determined by arbitration or by a suit, it was to be done by the agreement of the parties to the indenture, and that if by refusing his assent, as well to a suit as to an arbitration, he prevented T from complying with the conditions, he could not recover on the covenant; and consequently, that the plea was good in substance.

It was *held* likewise, that the plea, in alleging an unauthorized sale of T's moiety, so that no title to it vested in M, and also an offer to agree on a suit or an arbitration, was not bad for duplicity, for that the former allegation was not a ground of defence to the action, but either surplusage or merely inducement to the material allegation.

A plea alleging that the offer to agree on a suit or an arbitration was made to M, instead of the plaintiff, was *held* to be bad.

A plea alleging that the plaintiff and T agreed that a suit pending between the former master of the schooner and an insurance company should be the legal process whereby T's right to a moiety should be determined, that that suit was discontinued without the knowledge of either of the parties to the indenture, and that afterwards the administrator of T offered to the plaintiff and was always ready to agree on another suit or an arbitration, was *held* to be good in substance, and not bad for duplicity; the first part being either surplusage or merely inducement to the material allegation.

THIS was an action of covenant broken, brought for the use of Robert G. Mitchell.

The plaintiff declares, that by an indenture made on No-

Digitized by Google

vember 1, 1828, between Lord, the plaintiff, as agent of Mitchell, of the one part, and Tyler and Binney, the defendants, and one Trueman, since deceased, of the other part, (after reciting that Lord, as the agent of Mitchell, had, on that day, with the advice and consent of Trueman, sold and given a bill of sale of the whole of the schooner Susan to Binney, for the sum of 1950 dollars, of which sum 950 dollars had been paid to Lord, and also reciting that Trueman claimed to own a moiety of the schooner and had agreed to pay Lord 1000 dollars for the residue of the price of the schooner, with interest, within one year from the date of the indenture, unless he, Trueman, should before the expiration of that time legally establish his title to such moiety,) Trueman, Tyler and Binney covenanted with Lord, that they would pay to him the sum of 1000 dollars within one year from the date of the indenture with interest, subject to the proviso, that if Trueman should, within one year, by any legal process or arbitration that might be agreed upon between the parties, legally establish his title to such moiety, then and in such case the sum of 1000 dollars should not be paid, nor any part of it, — and subject to the further proviso, that if at the end of one year any process for the purpose of deciding whether Trueman was the legal owner of such moiety, should be depending and undetermined, then and in such case the payment of the 1000 dollars should be delayed until such process should be finally determined, and if by the termination of such process it should be found that Trueman was the legal owner of such moiety, then that sum should not at any time be paid; and the plaintiff then avers, that Trueman did not, within one year, by any legal process or otherwise, legally establish his title to such moiety, and that at the expiration of the year, no process for the purpose of determining that question was depending and undetermined, and so the plaintiff alleges, that on November 1, 1829, the defendants (Trueman being then deceased) ought, according to their covenant, to have paid the plaintiff the sum of 1000 dollars, with interest, but that they have never paid any part thereof, and so have broken their covenant.

The defendants plead, 1. *non est factum*; on which issue s joined.

Digitized by Google

Lord v. Tyler.

2. That on April 23, 1828, Trueman and one Morgan were owners as tenants in common, each of an undivided moiety of the schooner Susan, of which Morgan was then master; that on that day, while proceeding on a voyage, she was injured by the perils of the seas, and by reason thereof was carried into Key West, and that Morgan there, in his own wrong and without any legal authority from Trueman, or any justifying cause or necessity, undertook to sell and deliver her to one Greene, of Key West, who on June 4, 1828, unlawfully undertook to sell and deliver her to Mitchell, and that Mitchell then and there took possession of her and afterwards caused her to be sent to Boston and delivered into the custody of the plaintiff as his agent; that afterwards Trueman claimed to have possession of his moiety, in common with Mitchell as owner of the other moiety, but that Mitchell refused to permit him to have such possession; that the indenture was made by the parties thereto, for the purpose of adjusting their several interests in the premises, as is therein set forth; that Trueman, at the time of making the indenture and until his decease, was, and since his decease his administrator has been, and still is, ready to agree with the plaintiff in the appointment of arbitrators, or to the commencement and prosecution of any suit at law or legal process, by means whereof it might or may be determined whether Trueman had title to a moiety of the schooner, according to the form and effect of the indenture, and that on September 2, 1829, before the expiration of one year from the date of the indenture, the administrator, offered to the plaintiff to agree with him in the appointment of arbitrators, or in the commencement and prosecution of any action at law or legal process, by means whereof it might be determined whether Trueman had any title, but that the plaintiff then refused and ever since has refused to agree to the appointment of any arbitrators, or to the commencement and prosecution of any action at law or legal process for the purpose above mentioned.

3. The third plea differs from the second, in alleging that the offer to agree in the appointment of arbitrators &c., was made by the defendants in behalf of the administrator to Mitchell instead of the plaintiff, and that Mitchell refused &c

Digitized by Google

4. In the fourth plea, after setting out the sale by Morgan, the claim by Trueman, and the making of the indenture, the defendants aver, that before the making of the indenture, an action at law had been instituted by Morgan against the Atlas Insurance Company, for a sum of money alleged to be due to him from the company under a policy of insurance, wherein the company had insured him against the loss of his moiety of the schooner by perils of the seas during the voyage upon which she was proceeding on April 23, 1828, in which suit he alleged a total loss of his moiety on that day by the perils of the seas, and the necessary sale of the vessel by reason thereof; that that suit was pending and undecided on the day when the indenture was made, and that after the making of the indenture, Trueman and Lord agreed with each other, that that suit should be by them considered and taken to be the legal process, according to the indenture, whereby it should be determined whether Trueman had good title to a moiety of the vessel, and that if Morgan should prevail in that suit and recover judgment against the insurance company for indemnity for his moiety of the vessel, then Trueman should pay Lord the sum of 1000 dollars and interest thereon, as in the indenture provided, and that if the insurance company should recover judgment against Morgan, then Trueman should be thenceforth and forever discharged from any obligation to pay that sum under the indenture; that before the expiration of a year after the making of the indenture, and before any judgment was rendered in that suit, the suit was discontinued by Morgan, without the knowledge of Trueman and without his default, and so became of no effect to determine whether he should be held to pay the 1000 dollars and interest thereon; that from the time of the discontinuance of that suit until his decease, Trueman was, and since his decease, his administrator has been, and still is, ready to agree with the plaintiff in the appointment of arbitrators, or in the commencement and prosecution of an action at law or legal process, &c., and that on September 2, 1829, the administrator offered to the plaintiff to agree in the appointment of arbitrators, &c., (as in the second plea.)

Digitized by Google

Lord v. Tyler.

The plaintiff demurs to the second, third and fourth pleas, and assigns for causes of demurrer : —

1. That the pleas attempt to put in issue an immaterial point, or if they contain matters of defence, they are double, in this, viz. they allege an unjustifiable sale of Trueman's moiety of the vessel, so that the acquisition of title by Mitchell is denied, and they also allege the performance of acts by Trueman and his administrator in excuse or justification for the alleged breach of covenant, which matters in excuse or justification are not a consequence of the acts and things alleged to have been done and to have existed before the making of the indenture : —

2. That neither of the pleas denies, confesses or avoids the substantial matter in the breach of covenant alleged : —

3. As to the fourth plea in particular that no other issue can be offered or taken upon it, than can be offered and taken upon the second plea.

March 17th, 1832.

Sohier in support of the demurrer. Either the issue presented under the proposition, that no title passed to Mitchell, is irrelevant to the breach of covenant declared on, or the plaintiff's and Mitchell's non-compliance with the offer to refer to arbitrators or agree to the commencement of an action at law, is irrelevant to such breach. But if neither is irrelevant and immaterial, then either is a sufficient answer to the declaration, and so the pleas are double.

The fourth plea differs from the second, merely by the introduction of the allegations respecting the abortive suit brought by Morgan, which are altogether unimportant ; and so no other issue is presented under this plea than under the second. Suppose however that the suit of Morgan was the one by which Trueman's liability to the plaintiff was to be tried, then the covenant has become absolute, since that suit did not terminate in Trueman's favor. It was not contemplated by the parties to the indenture, that more than one suit should be brought to determine the question then in controversy.

The recital in the indenture indicates an intention, that if Mitchell, or the plaintiff in his behalf, will give up the vessel to the defendants, they will pay him 1000 dollars and interest,

Digitized by Google

unless they prove within a year that Trueman has a title to a moiety of the vessel. The mode of determining this question is pointed out, namely, by arbitration or suit at law. The terms of the indenture are, "if Trueman should, within one year, by any legal process or arbitration that might be agreed upon between the parties, legally establish his title." The defendants seem to think that the words "might be agreed upon," apply to the commencement of a suit, but it is manifest that they refer only to an arbitration, which could be had only by mutual agreement. Suppose that no action would lie, still the plaintiff was not bound to agree to an arbitration. If Trueman had covenanted to pay, unless he should do what was impossible, that would be no defence, but the covenant would be absolute. Com. Dig. *Condition*, *M*, 2; *Shubrick* v. *Salmond*, 3 Burr. 1637; *Hadley* v. *Clarke*, 8 T. R. 267. The proviso was inserted by Trueman for his own benefit. He undertakes to settle the question of title at his own hazard, with or without Mitchell's agreement to refer it to arbitrators. The proviso is independent of the covenant, and the plaintiff was not obliged to notice it in his declaration; it is only matter of defence. 1 Chit. Pl (5th edit.) 340. If the agreement in the proviso has reference to a suit, as well as to an arbitration, it is repugnant to the covenant and void, inasmuch as it would prevent the indenture from being carried into effect without a new voluntary agreement of the parties. *Scovel* v. *Cabell*, Cro Eliz. 107.

As to the effect of recital, he referred to *Lampon* v. *Corke*, 5 Barn. & Ald. 606; *Lambourne* v. *Corke*, 1 Dowl. & Ryl. 211.

C. G. Loring for the defendants. The facts stated in the pleas, that the vessel was owned by Morgan and Trueman, that she was sold without authority by Morgan to Greene and by him to Mitchell, and that she afterwards came into the possession of the plaintiff as Mitchell's agent, are merely inducement to the effective part of the pleas, namely, the averment of the offer and refusal to agree in the appointment of arbitrators or in the commencement of the suit. The pleas therefore are not double, nor do they present an immaterial issue. Chit. Pl. 230, 511, 512. As to what is inducement

Digitized by Google

Lord v. Tyler.

or immaterial and may be rejected as surplusage, see 1 Chit Pl. (1st edit.) 294; Stephen on Pl. 272, 274; *Rowles* v. *Lusty*, 4 Bingh. 431; *O'Brien* v. *Saxon*, 2 Barn. & Cressw. 908.

The agreement in the proviso, has reference as well to the commencement of a suit, as to an arbitration, for no suit could be brought without such agreement. The vessel was sold by Lord, as agent of Mitchell, and by Trueman, to Tyler and Binney. Trueman could not sue Mitchell, for Mitchell had not received the money for the whole vessel. Both might have sued Tyler and Binney, but for that purpose Mitchell's assent would be necessary. Nor could Trueman sue Tyler and Binney, for by the indenture, the money for his supposed moiety was not to be paid until the question in regard to his title should be determined. It is urged that a covenant to pay money upon an impossible condition, is absolute. The thing to be done in the present case, was to establish the title of Trueman. For this purpose two modes were pointed out; but one of them being impossible, the other was the only mode to be pursued, and a tender of performance in this mode saves the condition. As the performance was possible only by the consent of the plaintiff and he withheld his consent, the performance became impossible by his own act, and so the condition is saved. On the other hand, if the plaintiff had made the like offer to Trueman, and he had rejected it, the covenant would have become absolute. The offer to submit the question to arbitration was sufficient, without naming arbitrators, the proposition being rejected. *Badlam* v. *Tucker*, 1 Pick. 284, 287; *People* v. *Manning*, 8 Cowen, 297; Co. Lit. 206 *a*; 2 Bl. Comm. 156.

June 27th. Morton J. delivered the opinion of the Court. [After stating the pleadings.] The second plea is objected to on two grounds; first, that it is immaterial or an insufficient answer to the declaration; and second, that if a good answer in substance, yet it is bad in form, for duplicity.

In order to determine whether this plea contains a substantial defence to the action, it is necessary to examine the provisions of the indenture, as set forth in this plea, and ascertain the true meaning of the words there used.

Digitized by Google

The defendants and Trueman covenanted to pay the plaintiff 1000 dollars, in one year, with interest, provided that if Trueman should within one year, by any legal process or arbitration that might be agreed upon between the said parties, legally establish his title to one half of the schooner, then the 1000 dollars should not be paid.

The plaintiff contends that the condition must be performed by Trueman, in order to defeat this covenant; that there was nothing for the plaintiff to do; that Trueman, to avail himself of this condition, must establish his right to a moiety of the schooner, and that upon his failure to do it within the time prescribed the covenant to pay was absolute; that in the condition two modes are prescribed by which this should be done, the one, by arbitration, the other, by suit at law; the one, by agreement with the plaintiff, the other, without his consent or agreement; and that if the plaintiff declined the one, Trueman was bound to resort to the other. Now it is very obvious, that if this is the true construction, all the pleas in bar are bad.

It is here important to inquire, whether Trueman could maintain any adverse suit; because if he could not, this part of the condition was impossible, and so void, or the words must be construed so that the suit or process should be by the agreement of the plaintiff.

It appears from the indenture, as set forth in the declaration, that Trueman claimed to own one moiety of the schooner as tenant in common with Mitchell, for whom the plaintiff acted, and that this was the question which was to be tried in the manner prescribed in the proviso under consideration. We are of opinion that no adverse suit could be maintained, to determine the question which was in controversy between the parties. One tenant in common of a chattel can maintain neither trespass, trover nor replevin against his cotenant. If therefore an adverse suit was intended by the terms *legal process*, it was clearly impossible, and so an inoperative condition. But we do not believe that this proviso is chargeable with such absurdity. If by any fair interpretation it will admit of a construction which will give effect to all the expressions used, such construction should be adopted. It seems to us, that the

Digitized by Google

Lord v. Tyler.

proviso may admit of the construction contended for by the defendants, namely, that the means of determining the controversy as to the ownership of a moiety of this vessel, whether by arbitration or other legal process, was to be by the agreement of the parties to the indenture. Trueman could not therefore perform this condition without the consent and co-operation of the other party to the contract. It would be very unjust and absurd to compel the defendants to pay the amount of the covenant because Trueman had neglected to comply with the condition, when the plaintiff had prevented him from doing so in the only way in which it was practicable.

The defendants have alleged in their plea, that Trueman and his representative always were ready and offered to the plaintiff to agree upon a process or arbitration to determine the right to the moiety of the vessel in question, but that the plaintiff refused. Now we think here is stated a substantial defence to the action.

But there is a special demurrer, and the form of the plea is objected to on the ground of duplicity.

Duplicity, according to Gould on Pleading, 419, consists in alleging two or more distinct grounds of defence, when one of them would be as effectual in law as all of them. This is said to be inadmissible, because it produces useless prolixity and tends to confusion and the multiplication of issues. The rule requires that every plea should be confined to a single ground of defence; but it is not necessarily confined to a single fact, for several connected facts may be necessary to constitute one single complete ground of defence.

The duplicity is said to consist in this, that the defendants allege an unauthorized sale of Trueman's share of the vessel, so that no title vested in Mitchell, and also an offer or tender by Trueman's representative to agree on a process or arbitration according to the terms of the condition in the indenture. We have already endeavoured to show, that the latter allegation is a good and complete ground of defence against the action; and if the former is also, then the plea is double.

But we think the former allegation amounts neither to a performance of the condition, nor an excuse for non-perform

Digitized by Google

ance of it. The matter in controversy between the parties was, whether Trueman owned one half of the schooner. The condition was, that he should establish his right to the moiety in the mode to be agreed upon by the parties.

This must be considered as inducement to the material allegation, or as mere surplusage. Perhaps it might not be necessary to make this statement at all, and the plea would have been good without it. If so, it may be rejected as surplusage. Although the gist of the defence is not a necessary consequence of this allegation, yet it may be considered as properly introductory to and explanatory of the material ground of defence, and so good as inducement. Gould, 52.

Upon the whole, we are of opinion that the second plea is good in substance and in form, and that as to this the demurrer must be overruled.

As this plea is to the whole action, and is decisive of the case, it is not necessary to consider the third and fourth very minutely.

The principal difference between the second and third pleas is, the alleging in the latter, that the offer to agree on the process or arbitration was made to Mitchell, instead of the plaintiff. Mitchell was not a party to the indenture. The agreement as to the mode of determining the controversy, was not to be made by the parties to the controversy. The expression used is the *said parties*, which we can construe only as referring to the persons who had before been parties to the contract. For this cause then the third plea is bad.

The *fourth* plea is said to be double, because it alleges, that Lord and Trueman agreed that a certain suit then pending between Morgan and the Atlas Insurance Company should be the legal process whereby Trueman's right to a moiety of the vessel should be determined; that that suit was discontinued without the knowledge or consent of either of the parties to this agreement, and so became of no avail to determine their controversy; and also that afterwards the administrator of Trueman offered to the plaintiff to agree on another suit or legal process or arbitration, to determine the controversy as to the ownership of a moiety of the schooner; which the plaintiff refused.

Digitized by Google

Lord v. Tyler.

Now we think that the former allegation does not amount to a defence to the action, but that it was properly introductory to and explanatory of the material averment. If the agreement of the plaintiff to the mode of trial was necessary, then if the process agreed on was defeated by the act of Providence or without the fault of the other party, it is very obvious that the plaintiff's agreement was necessary to supply that defect. If Trueman and Lord had agreed upon an arbitrator, and that arbitrator had died before he had time to arbitrate on the subject, it cannot be doubted that it would be the duty of the plaintiff to agree on another arbitrator, and that he could not make the covenant to pay absolute on the defendants by refusing to do so. But if this introductory statement was wholly immaterial and unnecessary, it might, as before, be rejected as surplusage, and then the plea would contain the same matter which was deemed sufficient in the second plea.

Digitized by Google

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF BERKSHIRE, SEPTEMBER TERM 1833, AT LENOX.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE,
HON. SAMUEL PUTNAM, }
HON. SAMUEL S. WILDE, } JUSTICES.
HON. MARCUS MORTON, }

WILLIS BARTHOLOMEW *versus* ZACCHEUS CANDEE.

Where a deed of real estate was executed, with covenants of seisin and warranty, and an action was brought by the assignee of the grantee against the grantor for the breach of the covenant of warranty, the grantor pleaded, that he was not seised when the conveyance was made, and that so the covenant of seisin was broken at the time of the execution of the deed; the assignee took issue on this fact. It was *held*, that the assignee had thus waived his right to object that the grantor was estopped to deny his seisin at the time when the deed was executed, and that the jury were at liberty to find the truth.

If the grantor in a deed containing covenants of seisin and warranty was disseised at the time of the execution of the deed, no action will lie against him on such covenants in the name of an assignee of the grantee; for, the covenant of seisin being broken at the time of the execution of the deed, a mere right of action accrued to the grantee, which was not assignable.

COVENANT broken; in which the plaintiff declares upon a deed of a tract of land in Sheffield, dated April 1, 1815, with covenants of seisin and warranty, given by the defendant to Abel Thorp, and a deed of the same land, containing the

Digitized by Google

Bartholomew v. Candee.

like covenants, dated September 18, 1815, from Thorp to the plaintiff. The declaration sets forth a breach of the covenants of seisin and warranty.

The defendant pleaded first, *non est factum*.

The second plea averred, that on April 10, 1809, Daniel Sparks entered upon the premises, under a deed of warranty from the defendant, and on April 16, 1809, died seised thereof, and intestate, leaving a widow, Electa, and five children, to wit, Abigail, Maria, Levina, Angelina and Luanna; that the premises vested in the children as an estate of inheritance, subject to the widow's right of dower, and that at the date of the deed from the defendant to Thorp, they were still seised thereof; and that the defendant was not seised thereof, and so his covenant of seisin was broken at the time of the execution of the deed.

The third plea alleged, that Sparks, before April 10, 1809, entered upon the premises, and became seised thereof by disseisin, and that a freehold estate in the premises descended to his children, who continued seised thereof at the time of the execution of the deed to Thorp, &c.

The fourth plea, after stating the conveyance to Sparks, his death and the descent of the estate to his heirs, alleges that, on April 1, 1815, after Electa, the widow of Sparks, had intermarried with Noah Sellick, and at the joint request of Electa, Sellick and Thorp, the defendant was induced to destroy the deed to Sparks, and to execute the deed to Thorp, without any other consideration whatever than $ 24 named in the deed to Sparks; that at the same time, Sellick executed a bond to Thorp, in the penal sum of $ 300, conditioned, that whereas Thorp had purchased the premises, and had executed and delivered his promissory notes to Sellick for $ 150, and whereas the fee of the premises was in the heirs of Sparks, who were all minors, now if such heirs should convey to Thorp their respective shares in the estate, within six months after they should respectively become of age, and if Electa should, within two months from the date of the bond, release to Thorp her right of dower in the premises, then such bond should be void; that at the same time when Thorp executed his deed of the premises to the

Digitized by Google

plaintiff, he also assigned to the plaintiff this bond, and authorized him to collect the penalty thereof in the name of Thorp, but for the sole use of the plaintiff.

Upon each of these pleas, issue was joined.

At the trial, before *Shaw* C. J., the plaintiff produced the deed from the defendant to Thorp, and it appeared that the covenant of warranty was as follows: — "And furthermore I, the said Candee, do by these presents, bind myself &c. to warrant and defend the above granted and bargained premises to him the said *Candee*" &c.

For the purposes of the trial, the jury were instructed, that this being probably a mistake apparent upon the face of the deed, they would be warranted in finding a verdict for the plaintiff upon such covenant. It was also objected, that this was a variance from the declaration, but the objection was overruled.

On the issue on the first plea, the jury found for the plaintiff; on the issues on the second, third and fourth pleas, the jury found a verdict for the defendant.

It was agreed between the parties, that if the Court should be of opinion that the plaintiff was entitled to recover, the damages were to be assessed under the direction of the Court. For this purpose, it was further agreed or proved, that the premises were conveyed by the plaintiff, with covenants of seisin and warranty, after he had received the deed from Thorp, and that the grantees were evicted from a portion thereof by the widow and two of the heirs of Sparks; and that judgment had been recovered by such grantees against the plaintiff, upon his covenant of seisin, for $ 39·75, damages, and $ 14·20, costs.

Hall and *Byington* for the plaintiff. The defendant is estopped by his own deed to deny his seisin, at the time when the deed was executed. It may be said, that the plaintiff cannot avail himself of such estoppel unless he pleads it; but we contend, that it is not incumbent on the plaintiff to plead it in this case, as all the material facts are set forth in the pleas of the defendant, and appear on the record. *Howard* v. *Mitchell*, 14 Mass. R. 241; *Adams* v. *Barnes*, 17 Mass. R. 365. We could not have availed ourselves of the

Sept. 17

Digitized by Google

Bartholomew v. Candee.

estoppel by a demurrer; for if we had demurred, this would have been an admission of the truth of the defendant's plea, and so we should have been estopped from disproving the existence of the facts therein stated.

Besides, a conveyance by a disseisee is unlawful; and the defendant will not be permitted to take advantage of his own illegal act, to avoid his covenant; *Brinley* v. *Whiting*, 5 Pick. 348.

Dwight, *C. A. Dewey* and *Barnard* for the defendant. The covenant of seisin having been broken at the time of the execution of the deed, if any thing passed to Thorp it was merely a chose in action, which was incapable of being assigned by him. *Marston* v. *Hobbs*, 2 Mass. R. 439; *Bickford* v. *Page*, ibid. 460; *Porter* v. *Perkins*, 5 Mass. R. 233; *Wolcott* v. *Knight*, 6 Mass. R. 418; *Warren* v. *Childs*, 11 Mass. R. 222; *Greenby* v. *Wilcocks*, 2 Johns. R. 1; *Hamilton* v. *Wilson*, 4 Johns. R. 72; *Williams* v. *Jackson*, 5 Johns. R. 489; 4 Kent, 459; *Mitchell* v. *Hazen*, 4 Connect. R. 497; *Mitchell* v. *Warner*, 5 Connect. R. 497; *Garfield* v. *Williams*, 2 Vermont R. 327; *Andrew* v. *Pearce*, 4 Bos. & Pul. 158; *Lewis* v. *Ridge*, Cro. Eliz. 863. We say, further, that the deed to Thorp was wholly inoperative and void as to all these parties. *Somes* v. *Skinner*, 3 Pick. 61. It is said that the defendant will not be allowed to set up his own violation of law, as a defence; but there are many cases where such a defence is permitted. *Wheeler* v. *Russell*, 17 Mass. R. 258; *Thurston* v. *Percival*, 1 Pick. 415; *Springfield Bank* v. *Merrick*, 14 Mass. R. 322; *Swett* v. *Poor*, 11 Mass. R. 549; *Blackford* v. *Preston*, 8 T. R. 89; *Hunt* v. *Knickerbacker*, 5 Johns. R. 327; 1 Com. on Contr. 30; *Holman* v. *Johnson*, Cowp. 341.

Sept. 19th. WILDE J. delivered the opinion of the Court. The pleadings in this case are voluminous, but the merits are embraced in a very narrow compass. The plaintiff declares as the assignee of one Abel Thorp, in an action of covenant broken, upon a deed of conveyance from the defendant to said Thorp, with the usual covenants of seisin and warranty. The defendant pleads, that at the time of executing the deed declared on, he was not seised of the granted premises, but

Digitized by Google

that Abigail, Maria, Levina, Angelina and Luanna Sparks were seised of the same, and so that his covenant of seisin was broken at the time of the execution of his deed. This plea was traversed, and the jury have found, that the defendant was not seised; and this, we think, is decisive against the plaintiff's right of action; and the supposed mistake in the deed becomes unimportant.

It has been argued, that the defendant is estopped to deny his seisin; whether he would have been estopped to show his liability to the grantee, in order to defend himself in this action, if the plaintiff had pleaded the estoppel, is a question as to which there may be some doubt, but which we do not stop to consider; for however that may be, it is quite clear that the plaintiff, by taking issue on the fact as to the defendant's seisin, has waived the estoppel, and is now concluded by the finding of the jury. The estoppel appearing on the record makes no difference, although the plaintiff might have availed himself of the advantage on demurrer; *Kemp* v. *Goodal*, Salk. 277; but the fact being established by the jury, we are bound to give judgment according to the truth, as it appears of record. The principle is laid down in *Trevivian* v. *Lawrence*, Salk. 276, and is a familiar principle of the common law. If the defendant pleads the special matter on which he relies, and the plaintiff will not rely on the estoppel when he may, but takes issue on the fact, the jury shall not be bound by the estoppel, but shall find the truth, and the Court shall give judgment accordingly.

This point being established, it is perfectly well settled that no action will lie on this contract in the name of an assignee. By the breach of the covenant of seisin an action accrued to the grantee, which, being a mere chose in action, was not assignable. *Bickford* v. *Page*, 2 Mass. R. 460.

Judgment for the defendant

Digitized by Google

MELISSA SHERWOOD *versus* JOHN ROYS.

A person holding a promissory note as a trustee, may bring an action upon it in his own name; but a person holding a note as a mere depositary and agent, must bring an action upon it in the name of his principal.

ASSUMPSIT upon a promissory note made by the defendant, payable to Lucy Sherwood or bearer, dated January 2, 1827, for 200 dollars. Plea, the general issue.

At the trial, before *Putnam* J., the defendant contended that the plaintiff was not entitled to recover as the bearer of the note.

It was proved by the defendant, that Lucy Sherwood was the sister of the plaintiff; that while unmarried she deposited the note in suit, together with two notes made by one Jordan, and another made by one Foster, payable to herself or bearer, in the hands of the plaintiff, to keep until she (Lucy) should call for it; that about the same time she also made a deed of her real estate to the plaintiff; and that the plaintiff had stated, in conversation with a witness, that Lucy had not given her property to the plaintiff, but that the plaintiff was to restore the same to Lucy when she should call for it.

Lucy intermarried with Artemas Clothier soon after she had made the deed and the deposit of the notes, and removed with her husband to the westward, and died there in 1831. The husband took out letters of administration upon her estate in 1832. This action was commenced after the decease of Lucy.

It was contended by the plaintiff, that she was the lawful bearer and had a right to collect the money due on the note.

By consent the defendant was defaulted, and the plaintiff was to recover, if, in the opinion of the Court, the above facts did not constitute a legal defence to the action; but if they did constitute a legal defence, then the default was to be set aside and a new trial granted, to enable the plaintiff to disprove such defence.

Sept. 18th. *Hubbard*, for the defendant, insisted that upon the facts in the case, the plaintiff had no property in the note and was

Digitized by Google

not a trustee, but simply a depositary, and that by the death of her sister Lucy her authority was revoked. 2 Stark. Evid. 549.

Briggs and *D. N. Dewey*, for the plaintiff, contended that the plaintiff was a trustee to collect the note and hold the property for her sister, and to account for it when she should be called upon for that purpose; that she had power to receive payment before suit brought and to cancel or give up the note, and such payment would have protected the defendant. *Little* v. *Obrien*, 9 Mass. R. 423; *Erick* v. *Johnson*, 6 Mass. R. 196; *Dean* v. *Hewit*, 5 Wendell, 257; *Mauran* v. *Lamb*, 7 Cowen, 174, cites 3 Johns. Cas. 259; *Brigham* v. *Marean*, 7 Pick. 40.

Per Curiam. A promissory note payable to bearer, is payable to, and may be sued by, any person having the legal interest under a delivery by the payee. The production of the note in question by the plaintiff, is *primâ facie* evidence of her holding it as proprietor; and the burden is upon the defendant, if he would impeach such title. The original holder had a right to transfer the note to the plaintiff, so as to make her the legal holder and enable her to sue in her own name; or, if she chose, she might commit it to the plaintiff as her agent, to keep and to collect for her use. This would not be a transfer of the property; the plaintiff would be an attorney for the holder, and not the holder herself. If she sued, she must have sued in the name of her principal, Lucy. If the latter was the character of the transaction, the plaintiff's authority was revoked by the death or marriage of Lucy. There is much reason to believe that what took place was intended, not as a delivery to the plaintiff as an attorney and agent of Lucy, but as a holder, to sue and collect, and hold the proceeds either for her own use, or in trust for Lucy, and in either case the plaintiff would have a right to maintain this action. But as the report of the judge stands, we think the facts show, that the note was delivered to the plaintiff as a depositary and agent, and did not vest the legal interest in her, and therefore that she cannot maintain an action in her own name. *Sept.* 1833.

Under the agreement of the parties, the verdict is to be set aside, to let in proof as to the validity of this defence.

Digitized by Google

FREDERIC AVERY *versus* STEPHEN W. HALSEY.

Where two persons are claiming title to personal property adversely to each other, and one of them calls upon a third to assist in removing it, and the assistant has reasonable grounds to believe that his employer is the owner of the property, a promise of indemnity to the assistant is valid in law, although it subsequently turns out that the title of the employer was not good, and the act of removal was a tres pass.

Notice of the true owner's claim to the property, given by him to such assistant while the title was in dispute, was *held* not to be conclusive evidence that the assistant knew that the property was not in his employer.

An express promise of indemnity being made to such assistant by one who claimed no interest in the property, and such assistant having acted on the faith of it, it was *held* that the danger incurred was a valid consideration, and that an action on the promise might be maintained.

ASSUMPSIT. This action was incidentally connected with that of *Woodruff* v. *Nathan H. Halsey and Avery*, reported in 8 Pick. 333, and 9 Pick. 555.

The plaintiff brought his action against Stephen W. Halsey on a promise of indemnity, and alleged that Nathan H. Halsey, the defendant's brother, claiming to be the owner of a blacksmith's shop, engaged the plaintiff to assist him in taking it down and removing it; that the plaintiff, having been notified of the claim of Woodruff to the same shop, and having declined to proceed upon the sole promise of Nathan to indemnify him, Stephen, the defendant, promised to indemnify him; that Woodruff brought his action of trespass against Nathan and the plaintiff jointly, for taking down and removing the shop, and recovered a judgment, the whole of which was paid and satisfied by the plaintiff; and that Nathan has not paid any thing to the plaintiff by way of reimbursement or contribution.

At the trial, before *Shaw* C. J., the defendant contended that the alleged promise, being a promise to indemnify the plaintiff against the consequences of a tortious act in committing a trespass upon the property of another, was illegal and void, and that no action could be maintained upon it.

The jury were instructed, that if a person, knowing that another has an illegal design to take away the property of a third, upon request, assists in doing it, such assistance is itself

Digitized by Google

an illegal act, and any promise of indemnity made by the person having such illegal design, or by any other person in his behalf, would be unlawful and void and would not support an action; but when two persons are claiming title to personal property adversely to each other, and one of these claimants calls upon another person to assist in removing it, and the latter has reasonable ground to believe that his employer is the owner of the property, a promise of indemnity to such person is valid in law, although it subsequently turns out that the title of the employer was not good, and the act of removal was a trespass.

It being contended, that after notice by Woodruff, the plaintiff must be taken to have known that the property was Woodruff's and the act of taking it a trespass, the jury were instructed, that if the question of property was then disputed and doubtful, and not settled till afterwards, and that by a judgment of court, such notice was evidence of an adverse claim, but was not conclusive evidence that the plaintiff knew that the property was in Woodruff, such notice and claim of property not being admitted but denied by the party employing him and claiming his assistance.

It appearing that Stephen, the defendant, claimed no interest in the property himself, the jury were instructed, that if Stephen, acting for the benefit of Nathan, in order to induce the plaintiff to assist Nathan, made an express promise to the plaintiff to indemnify him, and the plaintiff acted upon the faith of it, the danger to be incurred by the plaintiff was a good consideration, and the promise was a valid one in point of law, and upon which the plaintiff might maintain an action.

A verdict was found for the plaintiff. If these directions were wrong, the verdict was to be set aside and a new trial granted.

Briggs and *Byington* for the defendant. It is obvious that the promise was to indemnify the plaintiff against the consequences of an illegal act; and it therefore cannot be enforced; *Russell* v. *Wheeler*, 17 Mass. R. 258; *Waymell* v. *Reed*, 5 T. R. 599. *Cannan* v. *Bryce*, 3 Barn. & Ald. 179; *Pennington* v. *Townsend*, 7 Wendell, 276; and his ignorance or knowledge of the true nature of the transaction does not

Sept. 1833.

Digitized by Google

Avery v. Halsey.

affect his right to recover. *Biggs* v. *Lawrence*, 3 T. R 454 ; *Furtado* v. *Rodgers*, 3 Bos. & Pul. 191 ; *Wilkinson* v. *Loudonsack*, 3 Maule & Selw. 126. The law will not imply a promise of contribution or indemnity as between co-trespassers, on account of the illegality of the consideration, and for the same reason it will not enforce an express promise in the like case. *Merryweather* v. *Nixan*, 8 T. R. 186 ; *Peck* v. *Ellis*, 2 Johns. Ch. R. 136. There is little analogy between this case and that of a bond of indemnity to an officer for attaching property. The officer is bound to execute his pre cept ; the property taken is in the custody of the law, so that the owner cannot sustain a damage ; the officer acts as the agent of the creditor, who is supposed to know that the property belongs to his debtor ; and the compensation of the officer is not increased by the increase of risk. Here the plaintiff could have declined acting ; the property was not placed in the custody of the law ; the real owner made a claim to the prop erty ; and the increase of risk augmented the compensation.

The plaintiff had knowledge that the property belonged to Woodruff, or, which is equivalent in a case like this, he knew that the title was in controversy, and not being obliged to assist either claimant, he should have left them to their legal remedies.

Kellogg, *Bishop* and *Porter*, for the plaintiff, cited Bull. N. P. 146 ; 1 Com. Contr. 31 ; *Allaire* v. *Ouland*, 2 Johns. Cas. 52 ; *Coventry* v. *Barton*, 17 Johns. R. 142 ; *Stone* v. *Hooker*, 9 Cowen, 154 ; *Train* v. *Gold*, 5 Pick. 380.

Sept. 19th. The *Court* were of opinion, that the several instructions to the jury were correct in point of law, and accordingly judgment was entered on the verdict.

Digitized by Google

JOSEPH SEELEY *versus* HENRY C. BROWN.

Where, during the pendency of an action in court, the declaration was amended, it was *held*, that such amendment, although it embraced a new demand, would not discharge the bail, if judgment was rendered on the original demand only; for the bail are liable only to the extent of the original demand, and cannot therefore be injured by the amendment.

In an action by a judgment creditor against the sheriff for not delivering over the bail-bond taken in the original action, the judgment debtor having avoided on the execution, the sheriff will not be allowed to give in evidence, in mitigation of damages, that the judgment debtor has been insolvent from the time of the rendition of the judgment against him.

CASE against the sheriff for the default of his deputy, David Rodman, in not delivering over a bail-bond to the plaintiff.

Upon a case stated, the following facts appeared. The plaintiff, on September 22, 1827, commenced an action of covenant broken against John, Elijah K. and King Williams.

The first count in the declaration in that action, alleged, that, on April 14, 1823, the plaintiff and Charles G. Williams and Amos S. Waring were partners under the firm of Seeley, Williams and Waring; that on August 1st, 1824, the partnership was dissolved; that the defendants, by their deed dated April 14, 1826, (of which profert is made,) covenanted with the plaintiff to indemnify him against any debts due from Seeley, Williams and Waring; that at the time of the execution of this deed, there was due from that firm to Judah Paddock & Co. the sum of $ 54·05, which sum the plaintiff had been obliged to pay to Paddock & Co. on April 1, 1827; the defendants having refused to pay the same; and that so the defendants had broken their covenant.

The second count in the same action alleged, that by the same deed the defendants also covenanted with the plaintiff, that Charles G. Williams should pay the interest that had accrued, at the time of the execution of the deed, on a debt then due from C. G. Williams and A. S. Waring [and in the declaration as amended, from Seeley, C. G. Williams and A. S. Waring] to Timothy Reed, the plaintiff having agreed to pay the principal of the debt; that Reed did require of Seeley and Williams and Waring payment of such interest,

Digitized by Google

Seeley v. Brown.

amounting to the sum of $ 63, and that Charles G. having refused to pay the same, the plaintiff, on July 1, 1827, paid that sum, as interest, on the debt due from Williams and Waring to Reed as aforesaid; and that so the defendants had broken their covenants.

The writ in the plaintiff's action against John Williams and others was delivered to Rodman to be served. Rodman returned, that no service was made on King Williams, and that he had arrested John and Elijah K. and held them to bail. The action was entered in court, and while it was pending, the plaintiff amended his declaration in the manner before stated He also added an amendment which averred, that on April 14, 1826, Williams and Waring were further indebted to Reed in one other sum of $ 70 for interest on a debt, the principal of which the plaintiff had assumed to pay; that the plaintiff, on August 1, 1826, had been obliged to pay to Reed the sum of $ 70, in discharge of the debt so due as interest from Seeley, Williams and Waring; that the defendants had not indemnified the plaintiff therefor, and so had broken their covenants.

At the May term 1830 of this Court, where the action against Williams and others was pending, by agreement of the parties the defendants were defaulted, and the plaintiff recovered judgment for $ 67·29 and costs, and released all other damages claimed in the suit. The execution issued on the judgment was delivered to Miles Bartholomew, another deputy of the defendant in the present action, with instructions not to arrest Elijah K. Williams. Bartholomew, on September 14, 1830, made return that he could not find John Williams in his precinct, and that not having directions to arrest Elijah K., the execution was wholly unsatisfied.

On September 15, 1830, Rodman being out of the Commonwealth, a demand was made by the plaintiff on the defendant in the present action, for the delivery of the bail-bond taken by Rodman; but the bond has never been delivered to the plaintiff nor returned into court.

It was agreed, that the plaintiff might prove, if it was competent to him to do so, and was material, that judgment was rendered in the action against John Williams and others for a

Digitized by Google

sum alleged in the first count to have been paid by the plaintiff to Judah Paddock & Co., in regard to which count no amendment was made.

It was neither admitted nor denied, that Elijah K. Williams was of sufficient ability to satisfy the execution in favor of Seeley, and if that fact should be material, either in bar or in mitigation of damages, a trial was to be granted in order to ascertain it.

It was further agreed, that the defendant might prove, if it was competent to him to do so and was material, that John Williams possessed no property, by which any part of the judgment debt might have been paid, from the time of the rendition of the judgment against him, and that he has remained insolvent ever since.

Upon this statement of facts, the Court were to render such judgment as law should require.

Byington, for the plaintiff, cited to the point, that the bail were not discharged by the amendment, *Ball* v. *Clafflin*, 5 Pick. 303; *Miller* v. *Clark*, 8 Pick. 412; *Bean* v. *Parker*, 17 Mass. R. 603; 1 Tidd's Pr. 250, 234; *Jackson* v. *Hassell*, 1 Dougl. 330; *Dahl* v. *Johnson*, 1 Bos. & Pul. 205; *Mitchell* v. *Gibbons*, 1 H. Bl. 76; *Fowlds* v. *Mackintosh*, ibid. 233; *Lockwood* v. *Hill*, ibid. 310; *Martin* v. *Moor*, 2 Str. 922. On the question of damages, he cited *Simmons* v. *Bradford*, 15 Mass. R. 82; *Heppel* v. *King*, 7 T. R. 370; *Stevenson* v. *Cameron*, 8 T. R. 28. *Sept.* 21, 1832

Hall, for the defendant, contended, that if it could be proved that the plaintiff had lost nothing by the neglect to deliver over the bail-bond, the defendant would not be liable. If the amendments discharged the bail, they will free the defendant from his responsibility. 3 Starkie on Evid. 1341, note 1, (Metcalf's ed.); *Brooks* v. *Hoyt*, 6 Pick. 468. In the present case, a new cause of action was introduced by the amendments, and consequently the bail was discharged. *Danielson* v. *Andrews*, 1 Pick. 156; *Hill* v. *Hunnewell*, ibid. 192; *Brigham* v. *Este*, 2 Pick. 420; *Denny* v. *Ward*, 3 Pick. 199. It is not competent for the plaintiff to show that the damages were assessed on the first count. *Dryden* v. *Dryden*, 9 Pick. 546.

Digitized by Google

Seeley v. Brown. Sept. 20th.

WILDE J. delivered the opinion of the Court. This is an action on the case against the sheriff for the neglect of one of his deputies, in not returning a bail-bond, taken by him in an action in favor of the plaintiff against John Williams and others, and for not delivering the same to the plaintiff on demand. The defence is, that after the service against Williams and others, the plaintiff, by leave of court, amended his original declaration, and inserted a new demand, and thereby discharged the bail. If such was the legal effect of the amendment, there can be no doubt, that it is competent for the defendant to show it, by way of defence, in this action. But we are of opinion, that it does not appear by the facts agreed, that any new demand was embraced by the amendment; and it is expressly agreed, that the plaintiff did not recover judgment on any such demand, but only on his original claim. Now if the amendment might embrace a new demand, yet as judgment was rendered on the original demand only, the bail are not liable but to that extent, and cannot therefore be injured by the amendment. To hold the bail discharged under these circumstances, would be going quite too far, and beyond any of the decisions cited by the defendant's counsel, which have gone far enough in limiting the privilege of amendment, and ought not to be extended. In *Hill* v. *Hunnewell*, 1 Pick. 192, it was decided, that, in an action where an attachment had been made, and that action and all demands had been referred to arbitration, and judgment had been thereupon recovered, the mere fact of entering into such a reference dissolved the attachment, and that it would likewise discharge bail, for otherwise subsequently attaching creditors, and bail, might be injured; but if it had been shown in that case, that no new demand had been admitted by the referees, then the subsequent attaching creditors could not have been injured, and the reason of the decision would have failed. And, that the plaintiff would have been allowed in that case to show that no new demand had been proved before the referees, nor allowed by them, appears quite clear by a note in the case of *Willis* v. *Crooker*, 1 Pick. 206. The burden of proof, it is there said, lay on the plaintiff; and so it undoubtedly would in the present case, if it were not removed by the defendant's admission

Digitized by Google

of the fact. But the fact being admitted, that the plaintiff took judgment for his original demand and no more, there is no ground remaining on which the bail could claim to be discharged. It becomes therefore unnecessary to decide the question, whether the amendment does embrace any new demand, or whether it amounts to any thing more than the assignment of a new breach of the obligation declared on in the original writ. However this may be, the plaintiff is entitled to judgment, and for his whole demand. The poverty and inability of the Williamses to pay, cannot be allowed to be given in evidence in mitigation of damages, as was decided in *Simmons* v. *Bradford*, 15 Mass. R. 82.

Judgment for the plaintiff.

NANCY A. HARTEAU *versus* JOHN HARTEAU.

A libel was filed by a wife for a divorce, on the ground of the desertion and cruel neglect of the husband; and it appeared, that the parties were married in the county of Berkshire, and after residing there for some years, took up their residence in the State of New York, where the alleged desertion and cruel neglect took place; that the wife thereupon returned into that county to live, and filed her libel there, but that at the time when it was filed, the husband retained his domicile in New York; and that such desertion and cruelty would be no ground of divorce by the laws of New York. The Court refused to decree a divorce *a mensâ et thoro*, on the ground that it had not jurisdiction of the case.

The maxim, that the domicile of the wife follows that of the husband, will not be applied to oust the Court of its jurisdiction, in case of a libel by a wife for a divorce. *Semble.*

THIS was a libel for a divorce *a vinculo*, on the ground of adultery committed by the husband. The libel also charged the husband with desertion and cruel neglect of the libellant.

It appeared, that the parties, who were natives of this State, were married in this county and resided here for several years after their marriage; that they then removed into the State of New York, where they took up their residence, and where the alleged desertion and neglect took place; that the libellant thereupon returned to her mother's residence in this county, and filed the libel; that she has lived here ever since; and that at the time when the libel was filed, the libellee had his domicile in the State of New York.

Digitized by Google

Harteau v. Harteau.

The *St.* 1785, *c.* 69, § 3, provides "that divorce from bed and board may and shall be granted for the cause of extreme cruelty in either of the parties." The preamble to § 7 declares, that "whereas it is a great expense to the people of this State to be obliged to attend at Boston upon all questions of divorce, when the same might be done within the counties where the parties live, and where the truth might be better discerned, by having the witnesses present in court," therefore it is provided by that section, "that all questions of divorce and alimony shall be heard and tried by the Supreme Judicial Court, holden for the county where the parties live, and that the decree of the same Court shall be final."

The *St.* 1810, *c.* 119, under which the libellant claimed a divorce *a mensâ et thoro*, provides, "that wherever any husband shall utterly desert his wife, or shall grossly or wantonly and cruelly neglect or refuse to provide suitable maintenance for her, being of sufficient ability thereto, in every such case the wife may be divorced *a mensâ et thoro*, and upon a libel for that purpose, the Supreme Judicial Court shall have as full authority as to alimony, and all other matters and things, as they now have, or may hereafter have, in other cases of divorce *a mensâ et thoro*."

By the laws of New York, no divorce can be decreed by the courts of that State, for cruelty and neglect on the part of the husband.

The case was argued in writing, by *Jones* for the libellant, and *Filley* for the libellee.

Sept. 20*th.* SHAW C. J. delivered the opinion of the Court. The ground of defence to this libel is, that the parties were not within the jurisdiction or limits, nor subject to the laws of the commonwealth, at the time of the act done, which is relied on as the cause of divorce.

We consider it to be proved, that these parties had *onâ fide* changed their domicile and become citizens of the State of New York, before the desertion charged. Such being the fact, it seems to us to be the same case as if they had never been inhabitants of this commonwealth. As such, it seems to fall within the principle of the cases of *Richardson* v. *Richardson*, 3 Mass. R. 153; and *Hopkins* v. *Hopkins*, 3 Mass. R.

Digitized by Google

153. The true ground of argument, in this case, is, not that the parties did not live in this county, but that they were not then subject to the jurisdiction of the Court, and their conjugal rights and obligations did not depend upon the operation of our laws.

The right to a divorce, and the cases in which it shall be granted, are regulated by the *St.* 1785, *c.* 69, § 3. The 7th section regulates the place where the trial shall be had. It appears from the preamble to this section, that two objects were to be accomplished by this act: the first, to transfer the jurisdiction from the governor and council to the Supreme Judicial Court; and the second, which resulted as a consequence from the other, to have the hearing in the several counties, instead of requiring all persons to attend at Boston, as they must when the jurisdiction was in the governor and council.

The term *live*, in this section, it appears to me, must mean where the parties have their domicile when the libel is filed, or the suit commenced.

To test this, suppose parties live as man and wife in Suffolk, and adultery is committed by the husband, but it is unknown to the wife. They remove into Middlesex *bonâ fide*, and whilst residing there, the adultery is discovered. Must the wife libel in Suffolk? It may be said, the fact was committed there; but the rule of locality, applicable to a trial for crime, does not apply. Suppose, in the above case, that whilst living at Boston, the husband had committed the offence in Providence, out of the jurisdiction of Massachusetts. Would not this be as much a good cause of divorce for the wife, as if done within the jurisdiction? The fact is to be tried, not because it is a violation of the law of the commonwealth, which the State has a right to punish, but because it is a violation of the conjugal obligation, contract and duty.

The wife is, in such case, entitled to a divorce; and if she continues to reside in the same county, her libel would properly be brought in that county, though the parties do not live therein, within the literal construction of the statute. But suppose, in the mean time, from necessity or otherwise, she has taken up her abode in another county; she still has a right to a divorce, and the question is, in what county shall she file her

Digitized by Google

Harteau v. Harteau.

libel. Neither of the parties now live in the county, where they formerly lived together. It would seem to be a good compliance with the requisition of the statute, which cannot be construed literally, to construe it *cy pres* and permit her to file her libel, in the county, where she has her abode at the time. *Lane* v. *Lane*, 2 Mass. R. 167. The statute directs that the suit shall be brought in the county where the parties live, for two reasons, to save expense, and because the *truth can be better discerned*. This would in general be true, not only because, often, the fact would be done at such place, but also because the parties would there be better known. It clearly does not limit the place of trial to the county where the fact was committed, because that is often out of the State, or in the State, but in a county other than that where the parties *live*.

Much obscurity has, we think, been thrown on the subject, by confounding the two questions, which are essentially different, viz. 1. In what cases a party is entitled to claim a divorce; and 2. In what county the libel should be brought.

As it is a right conferred by statute, the one question may sometimes depend on the other; for if by the terms of the statute no suit can be instituted, it is very clear that no divorce can be had.

But I think there may be cases, where the statute confers a right to have a divorce, in which the statute gives a general jurisdiction to this Court, and yet where the parties do not *live*, that is, have their domicile, either at the time of the *act done*, or at the time of the *suit commenced*, in any county in this commonwealth. If so, there are cases where the statute cannot be literally complied with, and must be construed *cy pres* according to the intent.

Suppose a husband commits adultery and then purchases a house and actually takes up his domicile in another State, but before his wife has joined him, she is apprized of the fact, and immediately files a libel for a divorce, and obtains an order to protect her from the power of her husband, as by law she may. He is an inhabitant of another State, and can in no sense be said to *live* in any county in this State. And yet it would be difficult to say that she is not entitled to have a divorce here.

Digitized by Google

Supposing, instead of the last case, he has actually purchased a house and changed his domicile to another State, and there commits adultery, and the wife, not having joined him, and not having left her residence in this State, becomes acquainted with the fact, and libels and obtains a similar order, could she not maintain it? Yet, in the latter case, at the time of the *act done*, and in the other, at the time of the *suit instituted*, the respondent, *one of the parties*, certainly did not live in any county of this commonwealth.

This suggests another course of inquiry, that is, how far the maxim is applicable to this case, "that the domicile of the wife follows that of the husband." Can this maxim be true, in its application to this subject, where the wife claims to act, and by law, to a certain extent and in certain cases, is allowed to act, adversely to her husband? It would oust the Court of its jurisdiction, in all cases where the husband should change his domicile to another State, before the suit is instituted.

It is in the power of a husband to change and fix his domicile at his will. If the maxim could apply, a man might go from this county to Providence, take a house, live in open adultery, abandoning his wife altogether, and yet she could not libel for a divorce in this State, where, till such change of domicile, they had always lived. He clearly lives in Rhode Island; her domicile, according to the maxim, follows his; she therefore, in contemplation of law, is domiciled there too; so that neither of *the parties* can be said to *live* in this commonwealth.

It is probably a juster view, to consider that the maxim is founded upon the theoretic identity of person, and of interest, between husband and wife, as established by law, and the presumption, that from the nature of that relation, the home of the one is that of the other, and intended to promote, strengthen and secure their interests in this relation, as it ordinarily exists, where union and harmony prevail. But the law will recognise a wife, as having a separate existence, and separate interests, and separate rights, in those cases where the express object of all proceedings is to show, that the relation itself ought to be dissolved, or so modified as to establish separate interests,

Digitized by Google

Harteau v. Harteau.

and especially a separate domicile and home, bed and board being put, a part for the whole, as expressive of the idea of *home*. Otherwise, the parties in this respect would stand upon very unequal grounds, it being in the power of the husband to change his domicile at will, but not in that of the wife.

The husband might deprive the wife of the means of enforcing her rights, and in effect of the rights themselves, and of the protection of the laws of the commonwealth, at the same time that his own misconduct gives her a right to be rescued from his power on account of his own misconduct towards her. *Dean* v. *Richmond*, 5 Pick. 461 ; *Barber* v. *Root*, 10 Mass. R. 260.

The place where the marriage was had, seems to be of no importance. The law looks at the relation of husband and wife as it subsists and is regulated by our laws, without considering under what law or in what country the marriage was contracted.

The good sense of the thing seems to be, if the statute will permit us to reach it, that where parties have *bonâ fide* taken up a domicile in this commonwealth and have resided under the protection and subject to the control of our laws, and during the continuance of such domicile, one does an act, which may entitle the other to a divorce, such divorce shall be granted, and the suit for it entertained, although the fact was done out of the jurisdiction, and whether the act be a crime which would subject a party to punishment or not; that after such right has accrued, it cannot be defeated, either by the actual absence of the other party, however long continued *animo revertendi*, or by a colorable change of domicile, or even by an actual change of domicile; and that it shall not be considered in law, that the change of domicile of the husband draws after it the domicile of the wife to another State, so as to oust the courts of this State of their jurisdiction, and deprive the injured wife of the protection of the laws of this commonwealth and of her right to a divorce.

But where the parties have *bonâ fide* renounced their domicile in this State, though married here, and taken up a domicile in another State, and there live as man and wife, and an act is done by one, which, if done in this State, would entitle

Digitized by Google

the other to a divorce, and one of the parties comes into this State, the courts of this commonwealth have not such jurisdiction of the parties, and of their relation as husband and wife, as to warrant them in saying, that the marriage should be dissolved. The case of *Barber* v. *Root*, is an authority for saying, that such a divorce would not be valid in New York.

It is of importance that such a question should be regulated, if possible, not by local law or local usage, under which the marriage relation should be deemed subsisting in one State and dissolved in another; but upon some general principle, which can be recognised in all States and countries, so that parties who are deemed husband and wife in one, shall be held so in all.

So many interesting relations, so many collateral and derivative rights of property, and of inheritance, so many correlative duties depend upon the subsistence of this relation, that it is scarcely possible to overrate the importance of placing it upon some general and uniform principle, which shall be recognised and adopted in all civilized states.

It appearing that the alleged desertion would be no ground of divorce, by the laws of the State of New York, that at the time of the alleged desertion, the parties had their home in that State and were not subject to the law and jurisdiction of this commonwealth, and that when the suit was instituted, the respondent still had his domicile in the State of New York, the Court are of opinion, that a divorce *a mensâ*, cannot be decreed, and that the libel be dismissed.* If it be true, as stated by the respondent's counsel, that no evidence was given of the respondent's ability to support his wife, that would seem to be an additional reason why the libel cannot be maintained.

* See Revised Stat. c. 76, § 7 to 11 inclusive.

Digitized by Google

WILLIAM E. GOLD *versus* ALONZO WHITCOMB *et al.*

A shopkeeper's account containing charges of articles sold to the defendants, some of them within six years before action brought, and also containing credits given more than six years before action brought, is not an account current or a mutual account, so as that the charges within the six years should draw the previous charges out of the operation of the statute of limitations.

The declaration by one of two defendants, when an account against them barred by the statute of limitations was presented to him, that he had paid enough of the other defendant's debts, was *held* not to amount to a new promise.

ASSUMPSIT on a shop account for articles of merchandise sold and delivered to Forristall and Whitcomb, the defendants, who were partners. The account commenced in December 1823, and ended in November 1825. There were charges nearly every month, and in 1824 and down to May 1825 there were various credits. The defendants kept no account with the plaintiff. The action was brought on October 7, 1831, and two small items under the date of November 1825, were the only charges made within six years before the commencement of this action. It was proved, that upon the account now sued being presented to Forristall in 1830, he said he had paid enough of Whitcomb's debts. Whitcomb was defaulted. It was resolved by the *Court*, that this was not to be considered as an account current or a mutual account, so as that the two last items should draw the others out of the operation of the statute of limitations; and that the declaration of Forristall did not amount to a new promise.

Gold for the plaintiff, cited *Cogswell* v. *Dolliver*, 2 Mass. R. 217; *Coster* v. *Murray*, 5 Johns. Ch. R. 522; 2 Stark. Evid. 899.

Bishop and *Lanckton*, *contrà*, cited *Kimball* v. *Brown*, 7 Wendell, 322.

Digitized by Google

DAVID ANTHONY, Petitioner, *versus* THE COUNTY COMMISSIONERS OF BERKSHIRE.

Where several parties aggrieved by the laying out of a highway, join in a petition for a jury, the verdict is in effect several distinct verdicts on the several rights of the parties, and it is competent to the Court of Common Pleas to accept and affirm the verdict as to one petitioner and set it aside as to another; and where the verdict is set aside as to one of the petitioners, it is the duty of the county commissioners to grant him a new jury.

THE petition sets forth, that the county commissioners located and established an alteration in a county road in Adams, over the respective lands of Anthony, the petitioner, and several other individuals; that they all applied to the commissioners to hear and finally determine upon the location by a jury; that a jury was accordingly empannelled; that the jury increased the damages allowed by the commissioners, to all the petitioners for a jury except Anthony, and that over his land they altered the location of the commissioners; that the verdict was returned to the Court of Common Pleas, and the court accepted the same so far as it concerned all the petitioners except Anthony, but that that part of the verdict which altered the location of the commissioners on his land was set aside; that the clerk of the court returned a certified copy of the verdict, with the adjudication thereon indorsed, to the commissioners; and that Anthony made application to the commissioners to order a new jury in the premises, but that they refused to make such order; wherefore Anthony prays this Court to issue a mandamus to the commissioners, requiring them to order a new jury.

And now, upon the hearing, it was conceded that the facts stated in the petition were true.

Briggs and *Robinson*, in support of the petition, argued that the finding of the jury in regard to each individual was to be considered as a separate verdict, and that as the verdict in the petitioner's case was set aside, he was entitled to a new jury. *St.* 1827, *c.* 77, § 12; *St.* 1802, *c.* 135, § 3; *Mendon* v *Worcester*, 10 Pick. 235. [See Revised Stat *c.* 24, § 34, 35, 36.] *Sept.* 19th.

Digitized by Google

Anthony v. County Com. of Berkshire.

Hubbard, on the other side, contended that the verdict was an entire thing; that it had been accepted in the whole, the part rejected being void; and that there could not be a new trial for a part of the case. *St.* 1827, *c.* 77, § 12; *Hannaball* v. *Spalding*, 1 Root, 86.

Sept. 20*th.*

Per Curiam. In a case of this kind the petition of different persons is in its nature several. The demands are several, and the grounds upon which they proceed are distinct. They are to be tried by one jury, for convenience and to save expense. The verdict is, in effect, several distinct verdicts on the several rights of the parties. We think therefore that it was competent to the Court of Common Pleas, in analogy to the general powers of courts, to affirm the verdict in part and set it aside in part. Were it otherwise, it would follow, that the whole proceeding of the Court of Common Pleas was erroneous, and a new trial should have been ordered as to all the petitioners for a jury. But considering the proceedings to be several, and that it was competent for the Court of Common Pleas to accept and affirm the verdict as to the other petitioners and to set it aside as to Anthony, he stood in the same situation as if he had been a sole applicant for a jury and upon a return of the verdict it had been set aside. In that case it would have been the duty of the commissioners to order a new jury. *Mendon* v. *Worcester*, 10 Pick. 235.

Mandamus ordered.

Digitized by Google

JOSEPH B. VARNUM *et al. versus* ELIJAH M. BISSELL.

The plaintiff's declaration set forth by mistake a demand of twelve dollars instead of twelve hundred, and in the Court of Common Pleas he recovered a judgment for nearly twelve hundred dollars; from which judgment the defendant appealed, but neglected to enter his appeal; and upon the plaintiff's complaint to this Court for affirmation of the judgment, the Court refused to allow him to amend the record of the Court below by inserting the word *hundred* after *twelve*; and also, inasmuch as the judgment was erroneous on the face of it, refused to affirm the judgment.

IN this case a judgment was rendered for the plaintiff, by the Court of Common Pleas, on common demurrer, and the action not having been entered in this Court by the defendant, who was the appellant, the plaintiff now filed his complaint to have the judgment affirmed. Upon inspection of the record it appeared, that the judgment was for one thousand and forty-seven dollars, and that in the declaration the sum claimed was twelve dollars. It was alleged by the complainant, and it was highly probable, that this was a plain clerical mistake on the part of the person who drew the declaration, by omitting the word *hundred* after *twelve*. The *ad damnum* was twelve hundred dollars.

C. A. Dewey, *Martin* and *Briggs*, on behalf of the plaintiff, asked leave to amend by inserting the word *hundred* after *twelve*, or if this were not admissible, they asked for an affirmation of the judgment as it stood. *Sept.* 19th.

But by the *Court*. The Court have clearly no authority to permit an amendment in the record of the Court of Common Pleas, even if the amendment in question were admissible if the parties were regularly before this Court. And on the other point, the Court are of opinion, that as the judgment of the Court of Common Pleas is erroneous upon the face of it, this Court ought not to affirm and make it the basis of a new judgment. *Sept.* 20th.

Complaint dismissed.

Digitized by Google

Parks *versus* Brewer.

In this case it was *held*, that an attorney at law who attends court on account of professional business and also upon a subpœna as a witness, is not entitled to costs as a witness, except to a day's pay for attendance on the day on which he testifies; or if, after completing his own business, he is detained as a witness, to pay for attendance during the whole time of the detention; but that if he comes to court solely as a witness, he then stands like other witnesses in regard to costs.

Gershom Turner *versus* Elijah M. Bissell *et al.*

By a written contract between B and R, B agrees to furnish R for one year with wool, to be worked into satinets, and R is to deliver to B all the satinets which the wool will make, and is to find and pay for warps for the same. For working the wool, finding warps, &c., B is to pay R forty per cent. on the sales of the satinets. Each is to pay half the charges. B is to have the whole direction of the sales, and should he make sales himself he is to have one and a half per cent. on forty per cent. of the sales. In an action against B and R for the price of the warps furnished by the plaintiff to R, it was *held*, that B was not a partner of R, and consequently was not liable to the action.

By virtue of *St.* 1834, *c.* 189, a plaintiff in an action, founded on contract, brought against several defendants, might be allowed to discontinue as against one who had been defaulted, and proceed against the others.

Assumpsit against Elijah M. Bissell and Josiah G. Root, to recover the value of goods contracted for by Root and delivered to him. Bissell was joined in the action, on the ground that he was liable with Root as a partner. The goods consisted principally of warps for the manufacture of satinet. The delivery of the goods was proved, and Root was defaulted. They were delivered, with two exceptions, between May 1, 1831, and May 1, 1832.

To prove that Bissell was a partner with Root in the business of manufacturing satinet, the plaintiff gave in evidence a written agreement between the defendants, dated February 21,

Digitized by Google

Turner v. Bissell.

1831, to this effect. Bissell agrees to furnish merchantable wool, delivered at his store, to be worked into satinets, for one year commencing on the 1st of May next, to be delivered in suitable quantities to Root, on the condition hereafter named. Root is to take the wool from Bissell's store and deliver to him all the satinets the wool will make, and Root is to find and pay for warps for the same. The wool is to be worked chiefly into a black mixture of a certain quality, and the satinets to be finished and put up in a certain manner, specified in the agreement, and when so finished, are to be delivered to Bissell at his store, with an account of the number of pieces and of the yards in each piece. Root is to complete and deliver from 1000 to 1500 yards each month. Should Bissell think the satinets are not as well made as required by the contract, the subject is to be left to arbitrators, who are to say what damage, if any, Root shall pay and how much better he shall thereafter finish the satinets. For working the wool, finding warps, &c., Root is to receive from Bissell forty per cent. of the sales, to be paid by Bissell to Root, one half, in cash, payable in three months after the delivery of each month's work, one quarter, in carding oil and dye stuffs, at his customary prices, and the remaining quarter, in goods out of Bissell's store, at customary prices. For expenses of boxes, transportation, freight, commissions and charges from here to and in New York and elsewhere, until sold, Root is to be charged with one half by Bissell, and this is to be considered as on the cash and goods payment. Bissell and Root are to pay each half the charges. Bissell is to have the whole direction of sales, agreeably to his best judgment, and should he at any time make sales himself, he is to charge Root one and a half per cent. on forty per cent. of the sales. For such blue mixtures as Root and Bissell shall agree to have made, Bissell is to pay sixty per cent. of the costs of the color more than if it was a black mixture, and Root the remaining forty per cent. If any differences arise out of the contract, they are to be submitted to J. Pomeroy and J. Stearns, (who are to choose an umpire, if necessary,) and their decision is to be final.

Shaw C. J., before whom the cause was tried, being of

Digitized by Google

Turner v. Bissell.

opinion that this instrument did not constitute a contract of partnership between the defendants, so as to render Bissell liable for the satinet warps delivered to Root, directed a nonsuit, reserving the question of construction for the consideration of the whole Court.

Sept. 18th

C. A. Dewey, *Martin* and *Bishop*, for the plaintiff, said that some of the expenses were to be a common charge upon both of the defendants, and that Root was to have a proportion of the profits and bear a proportion of the loss, and that they were partners as to third persons, if not as between themselves. *Waugh* v. *Carver*, 2 H. Bl. 235; *Grace* v. *Smith*, 2 W. Bl. 998; *Hamper*, *Ex parte*, 17 Ves. 404; *Dob* v. *Halsey*, 16 Johns. R. 34; *Hodgkinson*, *Ex parte*, 19 Ves. 291; *Smith* v. *Watson*, 2 Barn. & Cressw. 401; *Purviance* v. *M'Clintee*, 6 Serg. & Rawle, 259; *Musier* v. *Trumpbour*, 5 Wendell, 274; Chitty on Contr. 69.

Dwight and *Hubbard*, on the other side, argued that the satinet, when manufactured, was the sole property of Bissell, and that Root was merely an agent, who was to receive a stipulated compensation for his services. 3 Kent's Comm. 11; 1 Swift's Dig. 340; *Dry* v. *Boswell*, 1 Campb. 329, and note; *Hamper*, *Ex parte*, 17 Ves. 404; *Stevens* v *Briggs*, 5 Pick. 177; *Rice* v. *Austin*, 17 Mass. R. 197; 3 Stark. Evid. (Metcalf's ed.) 1071, 1072, and notes; *Muzzy* v. *Whitney*, 10 Johns. R. 226.

The opinion of the Court was afterwards drawn up by

WILDE J. The question submitted is whether the defendants are liable in this suit as partners. It is admitted that they were not partners *inter se*, for by the terms of their agreement they had not a mutual interest in the profits and loss of the business to which it related, which is essential to render a partnership complete. But the plaintiff's counsel contend that both of the defendants participated in the profits of the business, and were thereby chargeable with respect to third persons. And it is certainly a well established principle, that whoever participates in the profits of a trade, or has a specific interest in the profits themselves, as profits, is chargeable as a partner with respect to third persons. Gow, 14. But it is equally well established, that where a party is entitled to or re-

Digitized by Google

ceives a given sum of money, in proportion to a given quantum of the profits, as a compensation for his labor and services, he is not thereby liable to be charged as a partner. Gow, 19. Thus in *Dry* v. *Boswell*, 1 Campb. 329, the proprietor of a lighter agreed with a person to work his lighter, and to allow him therefor one half of the gross earnings as a compensation for his labor; and it was ruled by Lord *Ellenborough*, that such an agreement did not constitute a partnership. The cases of the seamen employed in the whale fisheries, and of shipments to India on half profits, come within the same distinction. So factors and other agents who receive commissions in proportion to the amount of sales, are interested in the profits, but as they have no interest in them, excepting so far as they may determine the amount of compensation for their services, they do not thereby become partners.

And we are of opinion that the present case falls within this distinction. The object of Bissell was to have his wool worked into cloth, and he agreed to allow Root, as compensation for manufacturing, an amount of money to be regulated by the amount of sales; and in no other manner was Root interested in the profits. The circumstance that Root was to find warps, does not affect the principle upon which the distinction as to compensation is founded. If Bissell had agreed with Root to pay him a certain sum for his services, and for supplying the warps, there could be no pretence for holding them as partners; and we can perceive no difference in principle, arising from the circumstance that the compensation was to be determined according to the amount of sales.

Motion to set aside the nonsuit overruled.

After this case had been reserved as before mentioned, the *St.* 1834, *c.* 189, was passed, providing "that if in any action founded on debt or contract now pending, &c., against two or more defendants, it shall appear at any time before final judgment therein, that any of the defendants was not a party to such contract, he shall be discharged therefrom, &c., and the plaintiff shall thereupon be entitled to recover against any other defendant or defendants in such action, in the same manner as if such action had originally been brought against

Digitized by Google

Turner v. Bissell.

such other defendant or defendants only." And the plaintiff moved to discontinue against Root and proceed against Bissell, inasmuch as the declaration set forth some demands for which, if the defendants were not partners, Bissell alone was liable, and property of Bissell had been attached on the writ. This motion was opposed, because Root, having been defaulted, had thereby confessed that he was a party to the contracts declared on and the statute was intended to authorize the plaintiff to discontinue against one of two defendants who had made a successful defence, as Bissell had done in the present case, and to take judgment against the other; and further, because it had been agreed that the plaintiff should become nonsuit, if the contract between Bissell and Root did not constitute a partnership. But the *Court* were of opinion, that under the statute a plaintiff might discontinue against a defendant who had been defaulted, and they said that if the statute had been in existence at the time when the case was reserved, the reservation would have been in accordance with it; they therefore granted the plaintiff's motion, thereby securing to him the benefit of his attachment, but under the circumstances they said he ought to be placed in no better situation as to costs, than if he were required to bring a new action. See Revised Stat. *c.* 100, § 6, 7.

Sylvester Brewer *versus* The Inhabitants of Tyringham.

The service as a juror, which by *St.* 1824, *c.* 119, renders one ineligible to serve again within three years, is a service as a juror in some court; a service on a sheriff's jury does not render the juror thus ineligible.

Assumpsit. It was objected to the verdict in this case, that one of the jurors had served within three years before his return on the venire to serve at the court at which this case was tried, and it was contended that by force of the *St.* 1824, *c.* 119, such juror was not *eligible*. It appeared in point of fact, that the juror had served on a sheriff's jury, under the act respecting highways, but had not been returned

Digitized by Google

on a *venire facias*, to serve as a grand or traverse juror, at any court.

It was insisted, by way of answer, that if the objection would have been originally well founded, (which was denied,) it was waived, and the counsel relied on *Amherst* v. *Hadley*, 1 Pick. 38.

But the *Court* were of opinion, upon the construction of the statute, that the service therein contemplated, was a service as a grand juror or traverse juror, in some court, and that a service on a sheriff's jury did not render the juror ineligible. [See Revised Stat. *c.* 95, § 12.]

Dwight, *Briggs* and *Porter*, in support of the objection to the verdict, cited *Rex* v. *Tremaine*, 7 Dowl. & Ryl. 684.

C. A Dewey on the other side.

Digitized by Google

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTIES OF HAMPSHIRE, FRANKLIN AND HAMPDEN, SEPTEMBER TERM 1833, AT NORTHAMPTON.

PRESENT.

HON. LEMUEL SHAW, CHIEF JUSTICE,
HON. SAMUEL PUTNAM, }
HON. SAMUEL S. WILDE, } JUSTICES.
HON. MARCUS MORTON, }

WILLIAM PARISH *et al. versus* JOHN STONE.

A contract to pay money, made upon no other consideration than that of equalizing the distribution of the promisor's estate after his decease, is without a sufficient legal consideration, and therefore cannot support an action or found a legal claim.

The donor's own promissory note, payable to the donee, cannot be the subject of a *donatio causâ mortis*.

Where a promissory note is given upon two distinct and independent considerations, and one is a consideration which the law deems valid and sufficient to support a contract, and the other not, the note will be apportioned as between the original parties, or such as have the same relative rights, and the holder will recover to the extent of the valid consideration, and no further; and where the parts of the note are not respectively liquidated and definite, the question, what amount was founded on one consideration and what on the other, is to be settled by the jury, upon the evidence.

THIS was an appeal from a decree of the judge of probate for the county of Hampshire, allowing an account presented by the appellee as executor of the last will of Cyprian Parish. The executor claimed in his account, and was allowed, as

Digitized by Google

a debt due to himself, the amount of a promissory note for 600 dollars, signed by the testator, payable in one year after his death. This allowance was objected to by the appellants, who were interested in the testator's estate, and upon the appeal issues were directed for the purpose of trying the executor's right to recover.

Upon the trial, before *Morton* J., it appeared that the appellee was the son-in-law of the testator. The note was proved to have been made to the appellee by the testator, during the testator's last sickness, and, as the evidence tended to show, as well for the purpose of compensating the appellee for certain services he had previously rendered at the request of the testator, as of equalizing more effectually the distribution of the testator's property among his children, than was done by a will, then previously executed, and which was afterwards established. But it did not appear that there was any agreement or understanding of the parties, or any act or declaration of the testator, to designate what part of the aggregate amount of the note was intended to be a compensation for services, and what part to equalize the distribution of the property. Another note was given at the same time to another son of the testator, for the like purpose of equalizing the distribution of the estate, which was not designed, in any respect, to be a compensation for services.

The note to the appellee was made on Thursday, and immediately delivered to the appellee, and the testator continued declining in health from that time until the ensuing Monday, when he died.

The jury were instructed to inquire whether there was any legal consideration for the note, and if so, to what extent; and they found that there was such a consideration, on account of services rendered, to the amount of 115 dollars.

Judgment was to be rendered upon the verdict, and the claim of the appellee allowed, either for the whole of the note, or only for the amount of the legal consideration for it, thus found by the jury, as the Court should direct.

Bates, *Dewey* and *Wells*, for the appellants, insisted that the note was shown to be without a legal consideration and therefore void, except for the sum of 115 dollars. *Fink* v.

Sept. 24th, 1832.

Digitized by Google

Parish v. Stone.

Cox, 18 Johns. R. 145; 2 Kent's Com. (1st edit.) 355. Had this sum been intended as the consideration for the whole promise, the whole amount claimed by the appellee might be recoverable; but it is found that the note was given, in part, for the purpose of equalizing the distribution of the testator's estate, which is not a valid consideration.

The note cannot be supported as a *donatio causâ mortis*. *Ward* v. *Turner*, 2 Ves. sen. 431; *Tate* v. *Hilbert*, 2 Ves. jun. 111. If a man about to die may give his promissory note without any consideration, for the purpose of distributing his estate, he may in effect make a will of real estate not attested by witnesses, as required by the statute, for the payment of the note may render necessary a sale of his real estate

L. Strong and *Forbes* for the appellee. Had there been no consideration for the note, it would nevertheless have been valid as a *donatio causâ mortis*. *Bowers* v. *Hurd*, 10 Mass. R. 427; *Hill* v. *Buckminster*, 5 Pick. 394; *Amherst Academy* v. *Cowls*, 6 Pick. 432; *Snellgrove* v. *Baily*, 3 Atk. 214; 1 Roper on Leg. (1st Amer. edit.) 25, 36; Swinb. *pt.* 1, § 7; Toller, (4th edit.) 233; Bac. Abr. *Legacies*, *A*; Com. Dig. *Chancery*, 3 *Y*, 4; *Lawson* v. *Lawson*, 1 P. Wms. 441; 1 Roper on Leg. (1st Amer. edit.) 32, 36, 37, 41; *Wright* v. *Wright*, 1 Cowen, 598.

The note purports to have been given for "value received," and this is *primâ facie* evidence of a valuable consideration. Moreover, the jury have found that there was in fact a valuable consideration to the amount of 115 dollars; and this is a sufficient consideration for the whole promise, except as against a creditor of the promisor. If there are two considerations for a promise, one valuable, the other not but not illegal, (as in the present case,) and there is no failure of either and no fraud nor mistake, the whole contract may be enforced. At the trial, it was not attempted to show that there had been any failure of consideration, and there being no fraud nor mistake, the damages cannot be reduced. *Amherst Academy* v. *Cowls*, 6 Pick. 432; 2 Stark. Evid. (Metcalf's edit.) 280, 282; *Pillans* v. *Mierop*, 3 Burr. 1670; *Sharington* v. *Strotton*, Plowd. 308; 1 Fonbl. 329; *Rann* v. *Hughes*, 7 T. R. 350, note; Chit. Contr. 276; 1 Dane's

Digitized by Google

Abr. 89, 109; *Farnsworth* v. *Garrard*, 1 Campb. 38, and note; *Tye* v. *Gwynne*, 2 Campb. 346; *Moggridge* v. *Jones*, 3 Campb. 38; *Greenleaf* v. *Cook*, 2 Wheat. 13; *Howard* v. *Witham*, 2 Greenl. 393; *Barber* v. *Backhouse*, Peake's R. 61; *Lewis* v. *Cosgrave*, 2 Taunt. 2; *Pikard* v. *Cottels*, Yelv. 56; *Bliss* v. *Negus*, 8 Mass. R. 51.

Sept. 24th, 1833.

SHAW C. J. delivered the opinion of the Court. This case has been argued for the executor upon three grounds: —

1. Supposing the whole note was intended to equalize the distribution of the testator's property, it may be supported as a contract;

2. It may be supported as a good *donatio causâ mortis*;

3. Or, if it cannot be supported upon either of these grounds, as there was in fact a valuable consideration in services, and the promise was entire, and no fraud proved, it is immaterial whether the consideration was adequate or not, any valuable consideration is sufficient to support a promise in a suit between the original parties, and therefore the damages ought not to be apportioned, and the appellee is entitled to recover the whole.

1. As a contract, it appears to us quite impossible that the promisee could support an action, or sustain a legal claim.

It is now well settled, that to support a promise or other contract, not under seal, as a contract binding in law, there must be a legal consideration; and in the application of this rule it is quite immaterial whether the contract be by parol or in writing. The law however attributes so much force and effect to the formal written contract, and to the words "value received," as to presume, in the absence of proof, that there was a valuable consideration for the promise; and if the promisor would avail himself of the defence, that it was without consideration, it lays the burden of proof upon him, satisfactorily to show that. But when the facts are disclosed, the burden of proof comes to be of little importance. It has therefore been the established rule of law, that in a suit upon a promissory note, against the promisor, by the promisee, or by an indorsee, without value given, or taking the note under such circumstances as to enable him to stand only upon the rights of the promisee, it is competent for the promisor

Digitized by Google

Parish v. Stone.

to show by way of defence, that the promise was gratuitous, and made without any legal consideration. *Bliss* v. *Negus*, 8 Mass. R. 46; *Hill* v. *Buckminster*, 5 Pick. 393. A contrary doctrine was laid down in *Bowers* v. *Hurd*, 10 Mass. R. 427; but it has frequently been stated, and by the judges who decided it, that although the decision of that case might well be supported, yet that the position there laid down, that a written contract could be supported without a legal consideration, could not be maintained. It was so intimated in *Mills* v. *Wyman*, 3 Pick. 208, but more distinctly in *Hill* v. *Buckminster* already cited, in which the same eminent judge who gave the opinion in that case, says, "In coming to this conclusion we undoubtedly overrule some of the expressions in the opinion, as reported, in the case of *Bowers* v. *Hurd*." The Court then distinctly lay down the principle, that notwithstanding the formality of a note or written promise, and the deliberation with which it may be presumed to have been made, still if it appear to have been made gratuitously, and without a legal consideration, though it may be binding *in foro conscientiæ*, it will not support an action; and further, that the common admission of "value received" is not conclusive, but may be inquired into, and contradicted by evidence.

Such being the clear rule of law, it follows that a contract to pay money, founded upon no other consideration than that of equalizing the distribution of one's estate, after his decease, is merely gratuitous; it is *nudum pactum*, given upon no sufficient legal consideration, and therefore cannot support an action or found a legal claim.

The rule being clear and well settled by authorities, it is not necessary to support it by a reference to the principle upon which it is founded. But as it appears sometimes to operate harshly and to defeat the intentions of those who have a right to dispose of property as they please, it may afford some satisfaction, to consider the importance of making and preserving a broad distinction between the claims of legatees and others, who rest their claims upon the bounty of the testator, and creditors who have demands upon his justice, which are in their nature paramount. The law in a variety of ways, and

Digitized by Google

upon the most satisfactory grounds, secures to creditors a preference. Indeed a holder of property, dying, can hardly be said to be the owner, beyond the balance which will remain after satisfying the demands of creditors. But if the holder of a gratuitous note can set it up as a legal claim, it would be extremely difficult to apply the rules of the law to his case, which are made for the purpose of preserving the distinction between volunteers and creditors. He would claim as a creditor, upon his contract; and if such a promise is allowed to have the character and effect of a contract, it is difficult to perceive upon what ground such a promisee could be prevented from recovering, either at law or before commissioners of insolvency, and coming in upon an equal footing with other creditors. And as to the circumstance, that in a particular case the intent of the owner of property may be defeated, it seems to be a perfect answer, that an owner of property has only to put his intent in the form of a bequest, and it will be carried into effect, as far as it can be consistently with the paramount claims of creditors and others, founding their claims upon legal contracts. To permit a bequest or voluntary gift to be made in the form of a binding and obligatory contract, conferring as they do, very different rights, and calling for different remedies, will seldom be resorted to for any useful or proper purpose, and would tend to a confusion and uncertainty of rights, extremely inconvenient in practice. And the adaptation of a general rule to practical utility and certainty, affords a very strong reason for adopting and adhering to it.

2. The next question is, whether the note in controversy can be deemed good as a *donatio causâ mortis*.

It is not necessary to go at large into the consideration of this species of title to property. It is now well settled, that under certain limitations, a gift may be made by one in present contemplation of death, of money or other property capable of passing by delivery; that to give effect to such a donation, there must be a clear and manifest intention of the owner to give, a subject capable of passing by delivery, and an actual delivery at the time, in contemplation of death; that such a gift is inchoate and does not become perfect till the death of the donor; that it is revocable by the donor during his

Digitized by Google

Parish v. Stone.

life, and if he recovers from the sickness or other cause of apprehended death, under which the donation is made, the gift is void. But where there is such a gift and actual delivery, and the expected death of the donor ensues, the gift is complete, and vests the property in the donee, presently, without its vesting in or passing through the executor or administrator, and it is liable to be divested only in favor of the creditors of the donor. 2 Kent's Com. (1st edit.) 358.

In the present case there is no doubt of the actual intention of the donor to make the gift, in contemplation of death, and of the actual delivery of the promissory note, to the donee, and the death of the donor, all which are essential requisites.

But we think the donor's own promissory note payable to the donee, could not be the subject of such a donation. It was not an existing available promissory note to any one; it was not a chose in action. We have already seen that it was not a binding contract by the promisor to the promisee; and if it were, it would be open to another objection as a *donatio causâ mortis*, namely, that it would not be revocable by the donor. It was simply a promise to pay money, and as such and as a gift of a sum of money, it wants the essential requisite of an actual delivery. In the case of *Bowers* v. *Hurd*, 10 Mass. R. 429, already cited, the Court, speaking of such a note, say, "We cannot consider it as a *donatio causâ mortis*, as was suggested at the bar, for that must be complete at the time, by a delivery of the thing given."

The necessity of an actual delivery has been uniformly insisted upon, in the application of the rules of the English law to this species of gift. It was, in some measure, from the strict application of this rule, and from the impossibility of making an actual delivery of that species of property, that it was long doubted whether choses in action, that is, bonds, notes, and other securities for money, could, in any way, be the subject of such a gift. In the case of *Ward* v. *Turner*, 2 Ves. sen. 431, where the whole subject was very fully discussed, and where the doctrine of actual delivery was insisted on as indispensable, it was held by Lord *Hardwicke*, that a gift of receipts for South Sea annuities was not a good *donatio*

Digitized by Google

causâ mortis, principally because the property in the stock did not pass by a delivery of the receipts, but a transfer was necessary, which was not made. But it has since been decided, that a delivery of such securities and choses in action, as pass a property to the bearer by delivery, may properly be the subject of this species of gift, where the securities are delivered, as bank notes or specie bills; *Drury* v. *Smith*, 1 P. Wms. 404; lottery tickets; *Gold* v. *Rutland*, 1 Eq. Cas. Abr. 346; and Exchequer tallies; *Jones* v. *Selby*, Prec. Chan. 300. And there can be no reasonable doubt, that a promissory note payable to bearer, or indorsed in blank, so as to pass by delivery, might also pass by a gift and actual delivery, as a *donatio causâ mortis*.

But whatever doubt may have existed, it has been decided, that as an assignment of a chose in action is now recognised as a good transfer of the equitable interest, and as such equitable assignment is manifested by a delivery over of the bond or other security for money, by a gift of such a bond, accompanied by an actual delivery of the bond, an equitable interest vests in the donee, and the executors of the donor, in whom the legal interest remains, are mere trustees for the donee, and bound to permit the donee to use their names, to enforce the payment of the bond at law. *Snellgrove* v. *Baily*, 3 Atk. 214; *Gardner* v. *Parker*, 3 Maddock, 184; *Blount* v. *Burrow*, 4 Bro. C. C. 72. And as a confirmation and necessary consequence of this doctrine, it has also been held, that a bond and mortgage may be a good subject of a gift; that an equitable interest in the money secured by the personal obligation, passes by a gift and delivery over of the security, that the mortgage attends and follows the debt, as an inseparable incident, that although the legal interest in the debt vests in the executor, and that of the mortgaged premises in the heir of the donor, yet in equity they are both to be considered trustees for the donee of the debt or sum of money secured by the mortgage, the executor, to permit the donee to sue in his name on the personal security, and the heir, to convey the mortgaged premises, in security of the debt. *Duffield* v. *Elwes*, 1 Bligh's New Rep. 514; *S. C.* under the name of *Dow* v. *Hicks*, 1 Dow & Clark, 1, in the House of Lords.

Digitized by Google

Parish v. Stone.

These cases all go on the assumption, that a bond, note or other security, is a valid subsisting obligation for the payment of a sum of money, and the gift is, in effect, a gift of the money, by a gift and delivery of the instrument that shows its existence and affords the means of reducing it to possession; all which ingredients are wanting in his own note given by the donor to the donee, without consideration, which is a mere gratuitous promise.

A case has been recently decided in England, which seems to be directly in point. It was assumpsit on a promissory note, payable to a child nine years old, given by a man in advanced age, in an imbecile state, who died a few months after. The action was against the executor of the promisor. It appeared that the maker was intimate with the child's father, and acquainted with the child himself. No consideration was proved. The judge at nisi prius had ruled, that "value received" imported a good consideration, and that the burden of proof was upon the party denying it, and that affection for the child, a friendship for the father, or a desire to avoid the legacy duty, would either of them be a sufficient consideration in point of law. On motion this verdict was set aside for misdirection, and the court in giving judgment say, it was for the jury to find whether the note was given upon any legal consideration; and that mere friendship or affection, would clearly, according to all the authorities, not establish a sufficient legal consideration. And Ch. J. *Abbott* added, "I am inclined to think, that the desire to avoid the legacy duty would be equally insufficient; because then the note would not be payable till after the donor's death, which here it might have been, and a promissory note is not good, as a *donatio causâ mortis*. *Holliday* v. *Atkinson*, 8 Dowl. & Ryl. 163; *S. C.* 5 Barn. & Cress. 501. In that case, it having been argued that the note was intended as a gift, and there being no evidence to disprove that view of the case, if the note could have been supported upon that ground, there was no sufficient reason for setting aside the verdict.

We are aware that there is one case having an opposite bearing, that of *Wright* v. *Wright*, 1 Cowen, 598. That case came before the court, on motion, after verdict for the

Digitized by Google

plaintiff, and under most unfavorable circumstances for the defendants, and the court refused to set aside the verdict. The case is very short, and no authorities are cited, and it seems to have been decided upon the ground, that a chose in action, a valid subsisting obligation for the payment of a sum of money, may be the subject of a good *donatio causâ mortis*, without distinguishing between the donor's own note payable to the donee, being a mere promise to pay a sum of money, and a note or other security for the payment of money, held by the donor against a third person. With the most entire respect therefore for the learned judges who decided that case, we think it opposed to the current of authorities.

3. But another question arises upon this case, which it becomes necessary to consider, and this is, whether as there was a legal and valuable consideration to some extent, in services, performed at the testator's request, and the promise was entire, the note may not be supported upon that ground.

It was argued for the plaintiff, that as between original parties and where the adverse rights of creditors are not in question, the law will not inquire into the adequacy or sufficiency of the consideration, that being left to be adjusted by the parties themselves, and that any legal consideration, of benefit to the promisor, or loss or forbearance on the part of the promisee, will be sufficient to give legal effect to the promise and to maintain an action. This principle is undoubtedly correct, and supported by the authorities.

But the difficulty in applying that rule to the present case, is, that in point of fact, the services were not the consideration; that is, the moving cause, the determining motive to the testator's promise. If the testator, considering the value and importance of the services, either before or after they were performed, and intending to make a liberal compensation therefor, had promised to give the sum of six hundred dollars therefor, it would be extremely difficult to contend upon the inadequacy of the consideration, that the plaintiff should not recover the full sum. If there were any doubt, as to that fact, it should be left to the jury to find whether in truth it was the intention of the testator, to give the note as a compensation for the services. But we are now to take it, that the question

March 21st

Digitized by Google

Parish v. Stone

has been so left, and the jury have found, that as to part of the note, the consideration was services, and as to the balance, it was intended as a mortuary gift by the testator, to render the distribution of his estate more equal and just, as he believed, than it would be left by his will, then executed. It being thus left, and the jury having thus found, it is impossible, as suggested in the argument, to reject this part of the verdict as immaterial.

Had the note been taken for two distinct liquidated sums, consolidated, and the consideration had been wholly wanting, or wholly failed as to one, it seems quite clear, that according to well established principles, supported by authorities, the note, as between the original parties, and all those who stand in such relation, as to allow the defence of want of consideration, it would be competent to the Court to apportion the note, and consider it good in part, and void in part, and to permit the holder to recover accordingly.

In Bayley on Bills, (Phillips and Sewall's ed.) 340, and in most other text books, it is laid down, that want or failure of consideration, is a good defence as between immediate parties, or holders without value, either total or *pro tanto*, as the failure goes to the whole, or part of the consideration. *Barber* v. *Backhouse*, Peake's R. 61. Where there was originally no consideration, for part of the sum expressed in the bill, the jury may apportion the damages; per Lord *Kenyon*. *Darnell* v. *Williams*, 2 Stark. R. 166.

That the holder in such case recovers on the note, and not on the original consideration, is rendered manifest by another series of decisions, thereby showing that the note is good *pro tanto*, as a negotiable instrument, upon which a holder by indorsement may sue and recover; whereas the right to recover upon the original consideration would not be negotiable and would not vest in the holder of the note by indorsement.

It being held that when a bill or note is made without value, or as an accommodation note, this may be shown as a good defence, against the payee; it is also held as a principle absolutely essential to the currency of bills and notes, that where an indorsee takes a bill for valuable consideration, or derives title though any one who has paid value for it, he shall recover to

Digitized by Google

the amount, notwithstanding it was originally made without value, and as an accommodation bill. It follows as a necessary consequence from these two principles, that where an indorsee of an accommodation bill has taken it for value, but for less than the amount expressed by the bill, there the holder shall recover only to the amount, for which he has given value. *Jones* v. *Hibbert*, 2 Stark. R. 304. In that case the defendant accepted a bill for $415, to accommodate Phillips & Co., who indorsed it to their bankers for value, and became bankrupt; the bankers knew it to be an accommodation acceptance, and their demand against Phillips & Co. was £265 only; it was held that they could only recover the £265, and they had a verdict accordingly.

So where a bill accepted as a gift to the payee is indorsed for a small consideration, the indorser can recover only to that extent. *Nash* v. *Brown*, Chitty on Bills, (5th edit.) 93.

From these cases it is manifest, that the plaintiff recovers on the bill and not on the original consideration; otherwise the right to sue and recover *pro tanto* would not pass to the indorsee by the negotiation of the bill. They therefore establish the proposition, that where the parts of a bill are divisible, making an aggregate sum, and as to one liquidated and definite part there was a valuable consideration, and as to the other part there was no consideration; the bill as such may be apportioned, and a holder may recover for such part as was founded on a good consideration.

But it is contended, that where the parts of the bill are not liquidated, and distinguishable by computation, a different rule prevails, and several English cases are relied on, to show that though the consideration fails in part, the whole bill is recoverable. *Moggridge* v. *Jones*, 14 East, 486; *Morgan* v. *Richardson*, 1 Campb. 40, note; *Tye* v. *Gwynne*, 2 Campb. 346; *Grant* v. *Welchman*, 16 East, 206. In these cases it was held, that where the note was given for an entire thing, and the consideration afterwards failed in part, the whole bill was recoverable, and the defendant was left to his cross action. As where the note was given for a lease and the lease was not completed according to contract; or for a parcel of hams, and they proved bad and unmarketable; or for goods, and they

Digitized by Google

Parish v. Stone.

were of a bad quality and improperly packed; or for an apprentice fee, and the apprentice was not kept by his master.

In this respect there seems to be some distinction between the English decisions and those of New York In the latter it was held, that upon a suit between original parties, upon a note given upon a contract to manufacture casks, the defendant might go into evidence to show that the casks were unskilfully manufactured, to reduce the amount of damages.

But without relying upon this difference, we think the English decisions may be well reconciled, by a reference to the known distinction between failure of consideration, and want of consideration.

All the cases put, are those of failure of consideration, where the consideration was single and entire, and went to the whole note, and was good and sufficient at the time the note was given, but by some breach of contract, mistake or accident, had afterwards failed. There the rule is, if the consideration has wholly failed, or the contract been wholly rescinded, it shall be a good defence to the note. But if it have partially failed only, it would tend to an inconvenient mode o trial and to a confusion of rights, to try such question in a suit on the note, as a partial defence, and therefore the party complaining shall be left to his cross action. This distinction, and the consequence to be drawn from it, is alluded to by Lord *Ellenborough*, in *Tye* v. *Gwynne*, 2 Camph. 346. He says, "there is a difference between want of consideration, and failure of consideration. The former may be given in evidence to reduce the damages; the latter cannot, but furnishes a distinct and independent cause of action." It seems therefore very clear, that want of consideration, either total or partial, may always be shown by way of defence; and that it will bar the action, or reduce the damages, from the amount expressed in the bill, as it is found to be total or partial respectively. It cannot therefore in such case depend upon the state of the evidence, whether the different parts of the bill were settled and liquidated by the parties or not. Where the note is intended to be in a great degree gratuitous, the parties would not be likely to enter into very particular stipulations as to what should be deemed payment of a debt, and what a gratuity. The rule to be deduced from the cases, seems to be

Digitized by Google

this, that where the note is not given upon any one consideration, which whether good or not, whether it fail or not, goes to the whole note at the time it is made, but for two distinct and independent considerations, each going to a distinct portion of the note, and one is a consideration which the law deems valid and sufficient to support a contract, and the other not, there the contract shall be apportioned, and the holder shall recover to the extent of the valid consideration, and no further. In the application of this principle, there seems to be no reason why it shall depend upon the state of the evidence, showing that these different parts can be ascertained by computation ; in other words, whether the evidence shows them to be respectively liquidated or otherwise. If not, it would seem that the fact, what amount was upon one consideration, and what upon the other, like every other questionable fact, should be settled by the jury, upon the evidence. This can never operate hardly upon the holder of the note, as the presumption of law is in his favor as to the whole note ; and the burden is upon the defendant to show, to what extent the note is without consideration.

Suppose a father proposes upon his son's going into business, to aid him by an advance of several thousand dollars, and for that purpose gratuitously offers him his note for that sum, but as his son had performed services to the value of a few dollars, for which no price was agreed, upon giving his note, the father, intending to cancel and discharge that and all other claims, takes a general receipt for all services and other dues, and afterwards, the note not having been negotiated, a suit should be brought on it, by the payee against the maker, might not the defendant show the want of consideration by way of defence *pro tanto?* and yet the amount must be settled by a jury, the evidence of the original agreement not distinguishing between what was payment, and what was gratuity.

On the whole, we are all of opinion, that it was rightly left to the jury to find what part of this note was given in compensation for services, the evidence showing that all beyond that was gratuitous. To the extent of the consideration of the note for services as found by the jury, judgment is to be entered on the verdict.

Digitized by Google

CHESTER M'GEE *versus* ISAAC B. BARBER.

An original writ was indorsed by I. B. B., who was not the plaintiff in the writ, and the defendant, having recovered judgment in the Common Pleas against the plaintiff for costs, sued out a writ of scire facias against I. B. B. to recover the same, in which it was alleged, by way of recital, that "I. C. B. indorsed the original writ in the said action." I. B. B. was defaulted in the Common Pleas, and the case being brought up to this Court on a motion in arrest of judgment, because it was not averred that the indorsement was made by I. B. B., it was *held*, that the scire facias in such a case was so far a judicial writ, that it was competent for this Court to look at the record upon which it was founded, and the misrecital was considered to be a mere misprision of the clerk and the motion in arrest was overruled.

It is not necessary to allege that the defendant in the scire facias indorsed as agent or attorney, for the *St.* 1784, *c.* 28, § 11, having required that an original writ shall be indorsed by the plaintiff or by some agent or attorney, whoever indorses, not being the plaintiff, is presumed to indorse as agent or attorney.

Nor is it necessary to aver, that on the avoidance of the plaintiff in the original writ the indorser became liable, this being an inference of law.

Nor is it necessary to aver negatively, that the judgment against the plaintiff in the original writ has not been reversed.

It is necessary to aver, that such judgment has not been satisfied; and this is sufficiently stated by averring that the necessary measures (specifying them) have been taken to obtain satisfaction, and that they have proved unavailing.

It is not necessary to aver, that by force of any law of the commonwealth the indorser became liable, the statute being a general law and the liability being merely an inference of law.

It is not necessary to aver that the original writ was indorsed before service, for the allegation that it was indorsed, imports an indorsement, conformably to the statute, before service.

SCIRE facias. The writ alleges, that whereas M'Gee, at the Court of Common Pleas held at Greenfield in August, 1826, recovered judgment against Asahel Parmenter for the sum of $16·82, costs of suit in an action commenced and prosecuted by Parmenter as plaintiff against M'Gee as defendant; and whereas three several writs of execution have issued against Parmenter, and have been returned wholly unsatisfied, all which appears of record; and upon the last writ of execution, issued on October 11, 1827, Parmenter was committed to gaol and there detained until released by taking the poor debtor's oath, as appears of record, whereby M'Gee has been put to great expense, &c; "and whereas also the said costs so recovered by the said M'Gee against the said Parmenter, and the said expenses and prison charges, so incurred as aforesaid, are yet wholly due and unpaid to the said M'Gee, and the said Par-

Digitized by Google

menter is unable to pay or satisfy the same, or any part thereof. And whereas also Isaac *C.* Barber, of Colerain aforesaid, esquire, indorsed the original writ, in the said action so commenced and prosecuted by the said Parmenter, against the said M'Gee, to wit, at &c. on &c., which said action was not supported by the said Parmenter, but judgment as aforesaid, in the same, was rendered for the said M'Gee; whereof the said M'Gee has made application for us to provide remedy for him in this behalf; now, to the end that justice may be done, we command you that you make known to the said Isaac *B.* Barber that he appear before our justices of our said Court of Common Pleas to be holden at Greenfield, &c., on &c., to show cause, if any he hath, wherefore the said M'Gee ought not to have his execution against him the said Isaac *B.*, as well for his costs, so as aforesaid recovered, as for the ex penses and prison charges so as aforesaid incurred by the said M'Gee," &c.

In the Court of Common Pleas judgment was given against Barber, upon a default; whereupon he moved in arrest of judgment for the following reasons:

1. Because, in the writ of scire facias, there is no allegation that Isaac *B.* Barber indorsed the original writ.

2. Because there is no allegation, that Isaac B. Barber indorsed the original writ, as agent or attorney of the plaintiff in the original writ, and thereby became liable on the avoidance or inability of the plaintiff in the original writ.

3. Because there is no averment, that the judgment against the plaintiff in the original suit, remains in full force and virtue, not annulled, reversed or satisfied.

4. Because it is not alleged, that Isaac B. Barber, by reason of indorsing the original writ, became liable to pay to the plaintiff the several sums, or either of them, mentioned in the scire facias, by virtue of any law of this commonwealth.

5. Because it does not appear, nor is it alleged in the scire facias, that any return has ever been made upon the execution, on which it is said that Parmenter was committed to gaol, by any officer duly authorized to execute the same, showing the avoidance or inability of Parmenter.

6 Because there is no averment, that Isaac B. Barber in

Digitized by Google

M'Gee v. Barber.

dorsed the original writ before the service thereof, or as agent or attorney of Parmenter, whereby he became liable to pay the costs in case of the avoidance and inability or insufficiency of Parmenter to pay the same.

Upon this motion the Court of Common Pleas ruled that the judgment be arrested; to which ruling the plaintiff filed exceptions.

Sept. 29th, 1832, and Sept. 24th, 1833.

R. C. Newcomb and *H. G. Newcomb* cited, in support of the first exception, *Hemmenway* v. *Hickes*, 4 Pick. 497;— of the fourth exception, *Cole* v. *Smith*, 4 Johns. R. 193;— and of the fifth, *Ruggles* v. *Ives*, 6 Mass. R. 494.

Wells and *Alvord*, for the plaintiff, cited against the first exception, *Rowell* v. *Bruce*, 5 N. Hamp. R. 381; *Coleman* v. *Earle*, 1 Str. 228; *Anon.* 7 Dowl. & Ryl. 511; *Marsh* v. *Berry*, 7 Cowen, 344; *Gatehouse* v. *Row*, 5 Mod. 305; *S. C.* 2 Salk. 663; *Shore* v. *Brown*, 1 Salk. 26;— and to the point, that the scire facias is a continuation of the original suit, and is amendable by the record, *Campbell* v. *Stiles*, 9 Mass. R. 217; *Burrell* v. *Burrell*, 10 Mass. R. 221, *Young* v. *Hosmer*, 11 Mass. R. 89; *Atkins* v. *Sawyer*, 1 Pick. 351; *Musgrave* v. *Wharton*, Yelv. 218; *S. C.* Hob. 4; *Wright* v. *Nutt*, 1 T. R. 388; *M'Gill* v. *Perrigo*, 9 Johns. R. 259; *M'Rae* v. *Mattoon*, 13 Pick. 53; *Rex* v *Landaff*, 2 Str. 1011;— against the second exception, Steph. Pl. 398; 2 Wms's Saund. 305 *a*, note 13; Gould on Pl. 50, *c.* 3, § 6;— against the third, 1 Wms's Saund. 330, note 4; 2 Chit. Pl. (1st edit.) 182, note *q*;— and against the fourth, Steph. Pl. 392; 1 Chit. Pl. (1st edit.) 218; 2 Chit. Pl. 274, note *c*.

SHAW C. J. delivered the opinion of the Court. The principal question in this case arises from the averment in the scire facias, that the former writ was indorsed by Isaac C. Barber, when it appears that the defendant, Isaac B. Barber was sued in this writ as such indorser, and has been defaulted.

The question is not without difficulty; and were this an original writ, it is doubtful whether it could be maintained; but being a writ of scire facias, it is subject to some different considerations.

Digitized by Google

Originally a scire facias was a judicial writ; and it is so still, in its principal characteristics. It is so far a judicial writ, that it takes up a cause in which other proceedings have been had; it issues upon some existing record; and it must issue from the court in which such proceedings have been had, and where such record remains. A bail-bond, strictly speaking, is not a part of the record; but in our practice, where bail to the sheriff are, by force of the statute, held liable as bail above, the bail-bond performs the functions and stands in the place of a recognizance, and is therefore consistently enough made the foundation of a scire facias, as a recognizance.

The proceeding by scire facias against an indorser, is closely analogous to that against bail, the indorser being, by force of the statute, rendered liable for the plaintiff, in certain contingencies, as the bail is for the defendant.

The writ being regarded as a judicial writ, it is deemed to be the act of the court and its officers, and consists in all the introductory part, of a recital of the previous proceedings there appearing. If there is a misrecital in those proceedings, it is deemed to be the misprision of the clerk, and there being the record and proceedings to amend by, it is amendable as of course, as well after service as before. *Campbell* v. *Stiles*, 9 Mass. R. 217; *Young* v. *Hosmer*, 11 Mass. R. 89. By a scire facias the record and proceedings are referred to, and we think it is competent for the Court to look into the record and proceedings referred to and recited, to see if there be any misrecital; and in doing so, we find that the writ was actually indorsed by Isaac B. Barber, the defendant, so that the alleged averment, that it was indorsed by a person of another name than that of the defendant, is a mere misrecital. Being a mere misrecital in a judicial writ, it is to be deemed the misprision of the clerk, and amendable as of course, by order of the same court where it is pending; and in any other court, taking the whole together, the misrecital is corrected by the record, the truth sufficiently appears, and the misrecital will be deemed a mere error in form. On these grounds we think there is no sufficient reason to arrest the judgment, for this cause.

Digitized by Google

M'Gee v. Barber.

Several other causes in arrest of judgment were assigned, which may be briefly noticed.

The statute having required that an original writ shall be indorsed by the plaintiff, or by some agent or attorney, whoever indorses it must be presumed to indorse as agent or attorney, and would be estopped to deny his liability. *Gilbert* v. *Nantucket Bank*, 5 Mass. R. 97.

That the indorser became liable on the avoidance of the plaintiff, is an inference of law from the facts, and needs not to be stated in terms.

We are not aware, that in a scire facias to enforce a judgment, it is necessary, although perhaps it is usual, to aver negatively, that the judgment has not been reversed. It certainly would not be necessary or possible to prove such negative averment. The presumption of law is, after a judgment rendered, that it remains in force, till the contrary is shown. It is necessary to aver that it is not satisfied, because it is in that contingency only that the indorser is liable. But we think that is sufficiently averred, by stating in the writ, that the necessary means were used for obtaining satisfaction, and that they have proved unavailing. The averment is, that all the costs recovered by the defendant against the plaintiff in the original suit, together with the subsequent expenses, remain wholly unpaid.

It was not necessary, we think, to aver, that by force of any law of this commonwealth the indorser became liable; the statute is a general law, to be taken notice of without being specially pleaded. It is sufficient to aver the facts which bring the indorser within the operation of the statute, without stating in terms the liability, which is an inference of law.

It is averred that the execution was returned, and what proceedings were had upon it; it was not necessary to set forth the officer's return, in terms, or to state the name of the returning officer. The avoidance of the plaintiff was the material averment, and the return is the proper proof of that averment.

We think it was not necessary to aver, that the writ was indorsed before service. The purpose of the indorsement is declared by the statute. The writ could not be legally served

Digitized by Google

without an indorsement, and therefore the averment that it was indorsed, is to be considered as used technically, and to import, by legal intendment, that it was indorsed, conformably to the statute, before service.

Exceptions sustained, and the motion in arrest of judgment overruled.

George Dickinson *versus* Richardson Hall.

Where the purchaser of a patent right gave therefor his promissory note, and the patent proved to be void, the note was held to be entirely without consideration, notwithstanding the vendor covenanted that he had good right to sell and convey the patented privileges, and that he would warrant the same against the claims of all persons.

A promissory note given for a void patent right, is without consideration, notwithstanding the vendor believed at the time of the sale, that the patent was valid.

To warrant a patent, the invention must be useful, that is, capable of some beneficial use, in contradistinction to pernicious, or frivolous, or worthless.

Assumpsit on a promissory note, dated January 8, 1830, for $137·50, by the payee against the maker. Trial before *Shaw* C. J.

The defence was, that the note was given in consideration of a limited right to the use of a patent machine for breaking and dressing hemp; that the patent was void; that if good, the plaintiff had no valid title to assign the right; and therefore that the note was given without consideration.

The jury were instructed, that if the patent was void, there was no consideration for the note; and that if the invention patented was not a new and useful invention, the patent was void.

The plaintiff executed a deed on January 8, 1830, by which he bargains, sells and conveys to the defendant and others, six eighth parts of the exclusive right to use, make and construct, and of vending the exclusive right to use, make and construct, in the towns of Deerfield, Greenfield, &c., an apparatus or machine invented by Joseph Hines and William Baine, entitled in their letters patent, a new and useful improvement in the machine for dressing hemp and flax, rotted or unrotted; and the plaintiff covenants as follows, to wit, tha.

Digitized by Google

Dickinson v. Hall.

"I have good right and lawful authority to bargain, sell and convey the said patented privileges in manner aforesaid, and further to warrant and defend the same against all and every person or persons lawfully claiming the same, for and during the term of the said patent.

It was contended, on behalf of the plaintiff, that as he had assigned to the defendant the limited right in question, with a covenant that he, the defendant, and his co-assignees, should have the exclusive use of the invention during the period limited by the patent, in the nature of a covenant of warranty, this covenant was a good consideration for the note, whether the patent was or was not valid. But the jury were instructed, that if the patent was void, the note was without consideration; and that such a covenant was not of itself a sufficient consideration.

It was also contended, that if the plaintiff purchased the right for a valuable consideration and sold it to the defendant, without any knowledge of its worthlessness, prior to the sale, the defence would be unavailable; so if the true value of the patent was not fully decided prior to the sale. But it was ruled otherwise upon both points. The jury were instructed, that if the patent was void from the beginning, whether the plaintiff knew it or not, or believed it or not, the note given for it was without consideration. It might have been otherwise had fraud or misrepresentation been imputed to the plaintiff; which was not done.

It was insisted for the plaintiff, that in deciding the question of usefulness, the jury were not to find for the defendant merely because the machine, when put in use, would not yield any pecuniary profit; but if it should accomplish the design of the patent, — as, for example, if it should dress hemp under some circumstances, for which the ordinary mode of dressing would not answer, although it might not be profitable to construct a machine for the purpose, yet it would be a useful machine.

The defendant contended, and moved the court to instruct the jury, that if the machine was not useful, the patent was void; and that in order to usefulness, the pretended invention must be capable of beneficial use; that if in this case it must be an unprofitable investment for any one to erect such a ma-

Digitized by Google

chine for the purposes stated in the specification, the patent was void.

In reference to both of these claims the jury were instructed, that to warrant a patent, the invention must be useful; that the general application of the term *useful*, is, *capable of any beneficial use*, in contradistinction to *pernicious* or *injurious*; that in the statute respecting patents the meaning may be a little more restricted, and that if an invention be utterly frivolous or worthless, it is not within the meaning of the law "useful." But if, under any circumstances, the machine in question could be applied to any beneficial purpose, as for the purpose of preparing hemp for bale rope, or where water power is cheap and labor high, it might be deemed a useful invention.

The evidence was left to the jury upon the originality and utility of the invention.

The jury returned a verdict for the defendant, and upon being asked by the court, by the request of one party and the consent of the other, upon what point they found, they answered that they considered that the invention was not profitable, and if not profitable, that it could not be useful.

If the jury were misdirected in matter of law, a new trial was to be granted.

Sept. 24th

Dewey, for the plaintiff, cited in regard to the point, that the plaintiff's covenant was a good consideration for the note in suit, *Fowler* v. *Shearer*, 7 Mass. R. 19; *Phelps* v. *Decker*, 10 Mass. R. 279; *Moggridge* v. *Jones*, 14 East, 486; *Lloyd* v. *Jewell*, 1 Greenl. 352.

To the point, that if the plaintiff bought and sold the patent right without knowledge that it was worthless, he was entitled to recover, *Barnum* v. *Barnum*, 8 Connect. R. 469; *Welsh* v *Carter*, 1 Wendell, 185.

The jury proceeded on an erroneous view, in finding that the invention was not profitable. The plaintiff did not stipulate that pecuniary profit might be derived from it, but that it was useful, that is, that the machine accomplished the object ntended and that this object was not frivolous. *Kneass* v. *Schuylkill Bank*, 4 Wash. C. C. R. 12; *Lowell* v. *Lewis*, . Mason, 182; *Langdon* v. *De Groot*, 1 Paine, 203.

Alvord, for the defendant, cited to the point, that if the

Digitized by Google

Dickinson v. Hall.

patent was void, there was a total failure of the consideration for the note, notwithstanding the plaintiff's covenant, and the defendant was not obliged to resort to a cross action on the covenant, *Knapp* v. *Lee*, 3 Pick. 457; *Frisbee* v. *Hoffnagle*, 11 Johns. R. 50; *Weaver* v. *Bentley*, 1 Caines's R. 47; *M'Allister* v. *Reab*, 4 Wendell, 483; *Steinhauer* v. *Witman*, 1 Serg. & Rawle, 447; *Tillotson* v. *Grapes*, 4 N. Hamp. R. 448; *Gray* v. *Handkinson*, 1 Bay, 278; *Bell* v. *Huggins*, 1 Bay, 327; *Chandler* v. *Marsh*, 3 Vermont R. 162; *Greenleaf* v. *Cook*, 2 Wheat. 13.

There is however no covenant of the validity of the patent. *Frost* v. *Raymond*, 2 Caines's R. 197; Com. Dig. *Covenant*, *A*, 4; *Merrill* v. *Frame*, 4 Taunt. 329; *Bliss* v. *Negus*, 8 Mass. R. 46.

The instructions to the jury on the point, that in order to give validity to a patent the invention must be useful, were correct. *Lowell* v. *Lewis*, 1 Mason, 182; *Bedford* v. *Hunt*, 1 Mason, 302; *Earle* v. *Sawyer*, 4 Mason, 6; *Langdon* v. *De Groot*, 1 Paine, 203; Davies on Patents, 279.

Sept. 26th.

The Court were of opinion, that the patent right being void, there was a total want of consideration for the defendant's promissory note, unless the plaintiff's alleged covenant of title in the patent right constituted a consideration; that such a covenant would not constitute a valid consideration, for the object of the defendant in making this contract was to obtain, not a mere covenant, but the conveyance of a patent right; that although the plaintiff might have purchased and sold the supposed patent right thinking it to be valuable property, still he could not recover in this action, for the defence did not rest on the ground of fraud, but on the ground that the defendant had received no value and his promise was *nudum pactum*; that an invention, in order to be the subject of a patent, must be useful for some beneficial purpose, and the verdict turned on that question; that the instructions to the jury on this point were correct and sufficiently favorable to the plaintiff; and that the finding of the jury, that the invention was not profitable and therefore not useful, must be taken in connection with the points made by the counsel at the trial, and the instructions of the judge. and without doing violence to the language of the

Digitized by Google

jury they might well be considered as using the term *profitable* not in reference to pecuniary profit merely, but in a broader sense, meaning that no person could make use of the machine in question advantageously.

Judgment according to verdict

Henry Rice *versus* John Catlin

In an action upon a promissory note it appeared, that the defendant had assigned his property in trust to pay the note in suit, after certain other debts should be paid; that there was no express stipulation in the assignment, on the part of the creditors that the plaintiff assented to the assignment and claimed the benefit of it, but that it was not executed by him; and that no part of the proceeds had been received by him. It was *held*, that these facts did not constitute a bar to the action; but that the Court might, in its discretion, grant a delay of judgment, to give reasonable time for the property to be converted into money and applied according to the provisions of the assignment.

Assumpsit upon three promissory notes made by the late firm of Samuel and John Catlin. The action was commenced against both members of the firm, but process was served on John Catlin alone, and the action was prosecuted against him only. The writ was dated August 22, 1831.

At the trial, before *Shaw* C. J., it appeared, that on November 13, 1826, the firm having become embarrassed in their affairs, assigned their personal property to Pliny Arms, upon trust, that he should, out of the proceeds thereof, pay the notes in question, after certain debts due to the assignee and others, should be paid. There was no express stipulation in the assignment on the part of the creditors. On November 17, 1826, Samuel Catlin made a similar assignment of real estate to Orlando Ware, Pliny Arms and Daniel Wells. The plaintiff assented to these assignments and claimed the benefit of them, but did not become a party by executing them.

It was contended, that the property would be sufficient, if applied according to the provisions of the assignments, to pay the notes in question, but it was admitted that no part of the proceeds had been received by the plaintiff.

The judge was of opinion, that these assignments afforded no defence to the action, and the defendant was thereupon de-

Digitized by Google

Rice v. Catlin.

faulted, subject to the opinion of the whole Court upon the facts and legal construction of the assignments. The default was to stand, or to be taken off and a nonsuit entered, or a new trial to be granted, as the Court should order.

Sept. 24th. *Dewey* and *Bates*, for the defendant, cited *Bull* v. *Loveland*, 10 Pick. 9.

Wells and *Alvord* for the plaintiff.

Sept 26th. *Per Curiam.* Upon inspection of the two assignments referred to, it is obvious, that although they purported, among other things, to be made upon trust, to pay over certain proceeds, if any should remain, after the payment of many other preferred debts, to the use of the plaintiff, in satisfaction of his demands, yet there is no express or implied stipulation on the part of the plaintiff to release, discharge or suspend his claims, and nothing by implication of law binding on him, except that he would receive the proceeds, when paid, at the hands of the trustees; and it would result as an inference of law, that when received, this payment would extinguish and discharge his debt, either in whole or *pro tanto*, as it should or should not prove sufficient for the purpose. Such being the nature and legal effect of these assignments, they afford no ground of defence to this action. The debt being proved, to constitute a good defence, there must be either payment, accord and satisfaction, or a release. But a mere pledge or collateral security, not yet productive, from which no actual satisfaction has been realized, is no bar. It may, under certain circumstances, afford ground for a claim on the Court, in its discretion, for a delay of judgment, to give reasonable time for the assigned effects to be converted into money and applied according to the terms of the trust.

Judgment for the plaintiff on the default

Digitized by Google

MELVIN LORD *et al. versus* EDWIN E. CLARK *et al.*

In indebitatus assumpsit on a promise made to L and H, the defendant was attached to answer to "L and H *and one R deceased*, copartners doing business under the firm of R. L and H," and the declaration alleged a promise to pay "L and H, *the surviving partners of the said firm of R, L and H.*" It was *held*, that the bail were not discharged by an amendment by which the words above italicized were struck out of the writ and declaration.

SCIRE facias against the bail of one Wilson. In the original writ the sheriff was commanded to attach Wilson, to answer to "Melvin Lord and John C. Holbrook *and one Eleazer J. F. Richardson deceased*, booksellers and copartners, doing business under the name and firm of Richardson, Lord and Holbrook," in a plea of the case, for that Wilson being indebted to the plaintiffs upon an account, in consideration thereof "promised the said Lord and Holbrook, *the surviving partners of the said firm of Richardson, Lord and Holbrook*, to pay them the same," but have refused, &c., to the damage "of the said Lord and Holbrook." Upon this writ Wilson was arrested, and he gave bond, with the defendants as sureties, to answer to the plaintiffs as described in the writ. The action was duly entered, and Wilson appeared; and upon leave to amend, the plaintiff's attorney struck out the words printed above in italics. In this amended state of the record judgment was rendered against Wilson upon a default. The cause of action in the original writ was a debt due to Lord and Holbrook, who after the decease of Richardson in 1829, continued to transact business under the name of Richardson, Lord and Holbrook.

Wells and *Doolittle* contended, that the amendments were essential, and that in consequence of them the bail were discharged. 1 Chit. Pl. (5th Lond. edit.) 21; *Jell* v. *Douglas*, 4 Barn. & Ald. 374; 2 Wms's Saund. 122, note 1; *Ditchburn* v. *Spracklin*, 5 Esp. R. 32; *Israel* v. *Simmons*, 2 Stark. R. 356; *Holmes* v. *De Camp*, 1 Johns. R. 34; *Smith* v. *Barrow*, 2 T. R. 477; *Willis* v. *Crooker*, 1 Pick. 204; *Bean* v. *Parker*, 17 Mass. R. 602, 603. Sept. 24th.

Forbes and *Shaw* for the plaintiffs.

Digitized by Google

Lord v. Clark. Sept. 28th.

The Court held, that the amendments related to matters of form; that the first clause struck out was senseless; that the second clause was mere *descriptio personæ*; *Buffum* v. *Chadwick*, 8 Mass. R. 103; *Hardy* v. *Call*, 16 Mass. R. 530; *Clark* v. *Low*, 15 Mass. R. 476; that both clauses might be rejected as surplusage; that without the amendments the same judgment might have been rendered against Wilson; and that the bail were not discharged.

Defendants defaulted.

James Bates *versus* Amos Norcross.

A deed of wild land executed and acknowledged by a grantor who had no right to the land, and duly recorded in the registry of deeds, and a mere entry by the grantee without an open exclusive occupation manifested by fencing or otherwise, do not amount to a disseisin against the will of the true owner.

The registry of a deed of land executed and acknowledged by a grantor who had no right to the granted premises, is not constructive notice to the true owner that such conveyance has been made.

The registry of a deed is constructive notice only to after-purchasers under the same grantor.

Writ of entry for about six acres of land lying in the town of Monson, formerly a part of the town of Brimfield. The demandant declared on his own seisin and a disseisin by the tenant.

At the trial, before *Shaw* C. J., the demandant relied upon a deed of July 10, 1827, made to him by Jonas Blodgett, of a certain share of the common and undivided lands of the original proprietors of land in Brimfield, and upon a survey and location made on the 11th of the same July, pursuant to the deed. This location embraced the land in controversy. The share of unlocated land which the deed purported to convey, was the right of Samuel Shaw, one of the original proprietors, and the location was claimed to be made in pursuance of a vote of the proprietors, passed May 30, 1781.

The tenant gave in evidence a deed to himself from Timothy Packard, dated October 8, 1816, and a deed from Ebenezer Davison, to Packard, dated May 17, 1816, both of which were recorded, embracing the premises, with general covenants

Digitized by Google

of seisin and warranty. It was admitted that the demandant intermarried with the only daughter and heir at law of Davison, and that she received assets by descent from her father, in real estate of much greater value than the land in controversy. Whereupon it was contended, 1. that as the demandant, in right of his wife, was privy in estate with Davison, he was estopped from setting up a title paramount to the title of his ancestor Davison, against the grant and warranty of Davison;—2. That as the tenant, were the demandant to recover in this action, would have his remedy by an action of covenant on the warranty against the demandant and his wife, such warranty, to avoid circuity of action, operates by way of rebutter to defeat and bar the action. The judge being of opinion, that upon one or both of these grounds the tenant must prevail, the demandant consented to become nonsuit, subject to the opinion of the whole Court upon these questions of law.

Another question of law was raised in the case. The tenant contended, that at the time of the conveyance by Blodgett to the demandant in July 1827, both the demandant and the proprietors of the common and undivided lands were disseised of the premises; so that whatever right or interest may have passed by that deed, the fee in this particular parcel did not pass. To establish this ground the tenant relied upon the deeds above mentioned, and also gave in evidence, in order to trace Davison's title further back, a deed from Simeon Keep to Davison, dated April 10, 1797, embracing the premises, with covenants of warranty, and duly recorded, and a deed from Mary Needham and Ebenezer Merrick with his wife Lydia Merrick to Keep, dated July 22, 1778, embracing the premises, with covenants of seisin and warranty, and recorded December 6, 1785. It was admitted that the demanded premises were open unenclosed woodland. It was also admitted that Packard entered under his deed from Davison, and that the tenant entered under his deed from Packard. Now the further question was this: whether the execution and registry of the deeds constituted a legal presumption of the seisin of the respective grantees, or the entry under the deed of Davison proved such seisin, and whether in consequence thereof the proprietors of the common and undivided lands

Digitized by Google

Bates v. Norcross.

and Blodgett were disseised of the premises, and by reason thereof no fee passed to the demandant by the deed of Blodgett and the location made in 1827; and if upon this ground the Court should be of opinion that the demandant was not entitled to recover, then also he was to become nonsuit.

Sept. 27th.

Wells and *Alvord*, for the demandant, argued, in regard to this last question, that a feoffment with livery of seisin operates as a disseisin of the true owner, only at his election; *Taylor* v. *Horde*, 1 Burr. 60; *Goodright* v. *Forester*, 1 Taunt. 578; *Jerritt* v. *Weare*, 3 Price, 575; *Doe* v. *Lynes*, 3 Barn. & Cressw. 388; 4 Kent's Com. (1st edit.) 475, 477; and if so, that a deed acknowledged and recorded, pursuant to our statute, and an entry under it, can have no greater operation; 4 Dane's Abr. 100 to 106; *Marston* v. *Hobbs*, 2 Mass. R. 437; 4 Kent's Com. (1st edit.) 477; Stearns on Real Actions, 6, 41; that to constitute a disseisin, in the case of wild land, there must be an open and notorious exclusive adverse possession; and that in the present case there was a mere entry under a claim of title, without notice to the true owner, and without the erection of fences, or any other circumstance tending to show an open exclusive possession, and consequently there was no disseisin. *Small* v. *Procter*, 15 Mass. R. 495 *Pray* v. *Pierce*, 7 Mass. R. 381. He cited also *Poignara* v. *Smith*, 6 Pick. 172; *S. C.* 8 Pick. 272; *Taylor* v. *Horde*, 1 Burr. 108; *Kennebeck Purchase* v. *Call*, 1 Mass. R. 483; *Brimmer* v. *Proprs. of Long Wharf*, 5 Pick. 131; *Jackson* v. *Schoonmaker*, 2 Johns. R. 230; *Smith* v. *Burtis*, 6 Johns. R. 197; *Wickham* v. *Freeman*, 12 Johns. R. 183; *Varick* v. *Jackson*, 2 Wendell, 166; *Wendell* v. *Blanchard*, 2 N. Hamp. R. 456; *Little* v. *Megquier*, 2 Greenl. 176; *Robison* v. *Swett*, 3 Greenl. 316; *Peters* v. *Foss*, 5 Greenl. 183; *Jackson* v. *Sharp*, 9 Johns. R. 163.

Dewey and *R. A. Chapman* for the tenant. An adverse possession of wild land, with notice to the true owner, s sufficient to constitute a disseisin. The effect of notoriety of possession is merely to give notice, and not to give seisin. Under our statute of 1783, *c.* 37, § 4, a deed with warranty duly recorded has the effect of a feoffment with livery of seisin. It appears that fifty-five years ago a deed with general warranty

Digitized by Google

was made to Keep. Keep conveyed, in like manner, to Davison, in 1797, and Davison to Packard and Packard to the tenant, in 1816. Entries are stated to have been made under the two last deeds, and the same is to be presumed in regard to the ancient ones; and all these deeds have been duly recorded; one of them forty-eight years ago. Here then was an adverse possession and a notice, which amount to a disseisin; and the disseisin is coextensive with the land included in the deeds. *Pray* v. *Pierce*, 7 Mass. R. 383; *Riley* v. *Jameson*, 3 N. Hamp. R. 27; *Lund* v. *Parker*, ibid. 51; *Jackson* v. *Oltz*, 8 Wendell, 440; *Green* v. *Liter*, 8 Cranch, 249. At least there was a disseisin as against the demandant He married the daughter and sole heir at law of Davison, and, by presumption of law, had all Davison's deeds, and he must have known of the deed from Davison to Packard. He had notice therefore of an adverse possession under a claim of title, and under these circumstances the law will not sustain his purchase of Blodgett. Bac. Abr. *Maintenance*, *E*; *St.* 32 *Hen.* 8, *c.* 9; *Swett* v. *Poor*, 11 Mass. R. 549; *Brinley* v. *Whiting*, 5 Pick. 348.

Sept. 28th.

WILDE J. delivered the opinion of the Court. The demandant, to establish his title, relies on a deed to him from one Jonas Blodgett, and the tenant denies that any thing passed by that deed, because Blodgett was disseised of the demanded premises at the time of the conveyance. To sustain this objection it is incumbent on the tenant to show an actual disseisin of Blodgett, so as to turn his estate into a right of entry or right of action; and it is not sufficient to show such acts as Blodgett might elect to consider as a disseisin for the sake of the remedy, as there is no evidence or pretence that he ever elected so to treat the acts relied on in the defence.

To constitute a disseisin in fact there must be a wrongful entry of a person claiming the freehold, and an actual ouster or expulsion of the true owner, or some other act which is equivalent. "A bare entry on another," says Lord Holt, "without an expulsion, makes such a seisin only that the law will adjudge him in possession that has the right; but it will not work a disseisin or abatement without actual expulsion." Anon. Salk. 246. Littleton defines a disseisin to be, where a man

Digitized by Google

Bates v. Norcross.

entereth into any lands or tenements where his entry is not congeable, and ousteth him which hath the freehold; and Lord *Coke* confirms the definition. In the case of the *Proprs. Kennebeck Purchase* v. *Springer*, 4 Mass. R. 418, *Parsons* C. J. lays down the same doctrine. "To constitute an ouster of him who was seised, the disseisor must have the actual exclusive occupation of the land, claiming to hold it against him who was seised, or he must actually turn him out of possession." In cases however of wild and uncultivated lands, where the proprietor has only a constructive possession, a tortious entry and open exclusive occupation and improvement are considered as tantamount to entry and ouster. *Small* v. *Procter*, 15 Mass. R. 495. In such cases, says *Parsons* C. J., "when a disseisor claims to be seised by his entry and occupation, his seisin cannot extend farther than his actual exclusive occupation; for no farther can the party seised be considered as ousted: for the acts of a wrong-doer must be construed strictly, when he claims a benefit from his own wrong." 4 Mass. R. 418.

Upon the facts reported it is very clear, that although the tenant had entered on the land demanded before the conveyance from Blodgett to the demandant, he never had the exclusive possession of any part of it by open occupation and improvement, for it is admitted that the land demanded always has been open unenclosed woodland. Blodgett therefore has never been disseised in fact, according to the principles laid down in the cases referred to, and the objection to the demandant's title cannot be sustained, unless the conveyance from Timothy Packard to the tenant and his entry under it, amount to a disseisin and constructive ouster of Blodgett. The tenant's counsel contend that such is the legal effect of that conveyance, which being duly acknowledged and recorded in pursuance of the statute of 1783, *c.* 37, was valid to pass the premises, without any other act or ceremony in the law whatsoever, and therefore operated as a feoffment at common law.

Whether a feoffment would have the effect supposed, at the present day, is a question upon which learned jurists disagree, but which it is not necessary to consider in the present case.

Digitized by Google

In the case of *Varick & al.* v. *Jackson*, 2 Wendell, 203, the chancellor remarks, that "by a careful examination of the authorities, it will be found that there could be no disseisin in fact, except by the wrongful entry of a person claiming the freehold, and an actual ouster or expulsion of the true owner, or by some other act which was tantamount; such as a common law conveyance, with livery of seisin, by a person actually seised of an estate of freehold in the premises; or some one lawfully in possession representing the freeholder," &c. That a feoffment according to the ancient doctrine had a more large and transcendent operation, must be admitted. Before the case of *Taylor* v. *Horde*, 1 Burr. 60, it was the settled doctrine, as it seems, that a feoffment would create an estate of freehold in the feoffee, although none was in the feoffor at the time of the feoffment. It was sufficient if the feoffor had possession, however slender or naked or tortious his possession might be. But the case of *Taylor* v. *Horde* and subsequent decisions have very much broken in upon the ancient doctrine as to the sweeping efficacy of a feoffment to work a disseisin in fact against the will of the owner, in cases where the feoffor is not seised, but has only a mere naked possession. The subject is discussed and the authorities are cited and commented upon by Chancellor *Kent*, in his Commentaries, with his usual ability and force, and he expresses a strong opinion in favor of the doctrine laid down by Lord *Mansfield* in the case of *Taylor* v. *Horde*. "The good sense and liberal views which dictated the decision in *Taylor* v. *Horde*, he says, seem to have finally prevailed in Westminster Hall, notwithstanding the strong opposition which that case met with from the profession. The courts will no longer endure the old and exploded theory of disseisin. They now require something more than mere feoffments and leases to work, in every case, the absolute and perilous consequences of a disseisin in fact." 4 Kent's Com. 475.

But, as already remarked, it is not necessary to decide as to the operation of a feoffment, as the conveyance set up in defence is not such a conveyance, but a conveyance under the statute, and divested no rights but those of the grantor. *Varick* v. *Jackson*, 2 Wendell, 203. The words of the statute are,

Digitized by Google

Bates v. Norcross.

"that all deeds or other conveyances of any lands &c., signed and sealed by the party granting the same, *having good and lawful right or authority thereunto*, and acknowledged by such grantor or grantors, before a justice of the peace &c., and recorded at length in the registry of deeds &c., shall be valid to pass the same, without any other act or ceremony in the law whatever." The words "having good and lawful right or authority," are material, and indicate the intention of the statute, that the right of the grantor only should pass by such conveyance. If the grantor had no right, then nothing would pass by his deed. And such has been the construction of the statute. In the case of *Marston* v. *Hobbs*, 2 Mass. R. 439, which was an action of covenant broken, the title set up by the defendant was derived from a constable's sale for non-payment of taxes, and *Parsons* C. J. remarks, that "if the defendant had not shown to the jury an authority in the constable to make the conveyance, he must have failed, notwithstanding the registry of the deed, which supplies the want of livery of seisin only where the grantor has right to convey." The same construction of the statute as to the effect of a constable's deed, is recognised in *Pray* v. *Pierce*, 7 Mass. R. 381. So in the case of *Little* v. *Megquier*, 2 Greenl. 178, it was decided that an entry on land under a deed recorded, and payment of taxes, were no evidence of a disseisin of the true owner, unless he who entered had continued openly to occupy and improve it. In the present case it does not appear the Timothy Packard, when he conveyed to the tenant, was seised of the granted premises. At the most, he had but a naked possession under his deed from Ebenezer Davison, whose title does not appear to have been derived from any one having a lawful possession or seisin. The true owner therefore was not disseised by operation of these conveyances.

But it has been argued, that although the deed from Packard to the tenant did not operate as a disseisin, yet as he entered under color of that conveyance, he thereby acquired a seisin, and that this fact, being made known to Blodgett, operated as a disseisin, and is to be considered as tantamount to an ouster or expulsion. It is not, however, on this report necessary to determine whether this position can be maintained,

Digitized by Google

for there is no evidence of any notice to Blodgett. It has been argued that the registry of the deed is presumptive notice; but we think not. It is only evidence of notice to after-purchasers under the same grantor. To hold the proprietors of land to take notice of the records of deeds, to determine whether some stranger has without right made conveyances of their lands, would be a most dangerous doctrine, and cannot be sustained with any color of reason or authority. Nor is there any evidence of notice to the demandant, if that fact were material. His marriage with the daughter of Davidson is no proof that he had any knowledge of any conveyance made by him. At all events, the question of notice is for the jury, and if the tenant can prove the notice by competent evidence, he may do it on a new trial.

On the other question the Court gives no opinion, as the counsel for the tenant has relied on the evidence of disseisin, and has not argued the question of estoppel or rebutter.

Nonsuit taken off and new trial granted.

Digitized by Google

NOAH SHEARER *versus* NOAH JEWETT.

By a written agreement the defendant was to carry on the plaintiff's farm, and was to have for his labor one half of the produce; the plaintiff was to furnish him with all seeds necessary to sow, and the defendant was to pay the plaintiff for one half of the seeds sown or return one half after harvest, at the defendant's option; and the plaintiff was to furnish the defendant with grain, until he could harvest the crops, and was to receive the same quantity at harvest, or the value in money. The plaintiff furnished a parcel of rye and a parcel of oats, a part of which was sown and the residue used by the defendant; also a quantity of hay; and the defendant raised a quantity of oats on the plaintiff's farm, and sold them. In indebitatus assumpsit brought while the special contract was in force, it was *held*, that the plaintiff could not recover for the rye and the first parcel of oats, because they were embraced by the special contract and the defendant had a right to pay for them in kind; but that he could recover for the hay, because it was not included in the special contract, and for half of the last parcel of oats, because by the sale the defendant had put it out of his power to deliver them in kind.

Where the parties had agreed that a default should be entered, subject to the opinion of the Court, and that judgment should be rendered for the plaintiff for one of two sums, the Court nevertheless, on motion of the plaintiff, granted a new trial, holding such agreement to be subject to the order of the Court.

INDEBITATUS assumpsit for goods sold and delivered, to recover the amount of divers items contained in a bill of particulars. The action was brought in September, 1831.

At a trial in the Court of Common Pleas, in 1832, before *Strong* J., the defendant offered in evidence an agreement, not under seal, signed by the plaintiff and the defendant, dated April 11, 1831, by which the plaintiff leased to the defendant a farm. In the lease it was stipulated, among other things, that the defendant should carry on the farm, and that he should have for his labor one half of all the hay and produce and pasturing, except the rye then on the ground; that the plaintiff should furnish all the seeds necessary to sow, and that the defendant should pay him for one half of the seed sown, or return one half after harvest and interest, at the defendant's option; that the defendant might dispose of the one half above described; that the plaintiff should furnish the defendant one pair of oxen, &c., certain farming tools, &c.; that the defendant should have the privilege of sowing for another season, and should have the one half as thereinafter agreed; that the plaintiff should furnish the defendant with grain, potatoes and cider, so much as he might want until he could harvest the abovenamed crops, and should re-

Digitized by Google

ceive the same number of bushels at harvest that the defendant might have disposed of, or receive the money and interest of the same, on the appraisal at the delivery; that the abovenamed corn and potatoes should be divided equally and put into the chamber.

The defendant contended, that the plaintiff was not entitled to recover in the present form of action, but the court ruled that he might recover for four of the items in the bill of particulars, namely, 6 bushels of rye, 32 bushels of oats, 2 tons of hay, and 9 bushels of oats. It was proved that the 6 bushels of rye and the 32 bushels of oats, were the property of the plaintiff, of the growth of 1830, and were received by the defendant in the spring of 1831, and that a part thereof was sown and the residue used by him. The 2 tons of hay were the property of the plaintiff, of the growth of 1830, and were received by the defendant in the spring of 1831 and used by him. The 9 bushels of oats were one half of 18 bushels raised on the farm by the defendant in 1831, which were sold by him and the money received before this action was brought. In the early part of September, 1831, the plaintiff exhibited to the defendant an account of these four items, and the defendant admitted that he had received the articles, except that he disputed the quantity of the charges of 32 bushels of oats and 2 tons of hay.

The defendant also contended, that the plaintiff was not entitled to recover, until he had proved that he had performed all things on his part to be performed, according to the contract; but the court decided, that he was entitled to recover without such proof; that all which it was necessary for him to prove, was, the sale and delivery of the four items; and in respect to the 6 bushels of rye and the 32 bushels of oats, that the time of harvest for these kinds of grain was past, before the action was brought. The rye, the 32 bushels of oats, and the hay, were received by the defendant after he went into possession of the farm.

The jury found a verdict for the plaintiff; and the defendant excepted to these decisions of the court.

Ashmun, for the defendant, insisted that the articles in controversy were delivered under the special agreement; that this

Sept. 25th 1832

Digitized by Google

Shearer v. Jewett.

agreement was still in force, unrescinded, and consequently the plaintiff could not resort to an implied promise. Lawes on Assumpsit, 22, 27, 28; *Felton* v. *Dickinson*, 10 Mass. R. 287; *Goodrich* v. *Lafflin*, 1 Pick. 57; *Baylies* v. *Fettyplace*, 7 Mass. R. 329; *Penny* v. *Porter*, 2 East, 2.

The contract includes many things executory on the part of the plaintiff, and these should have been set forth in the declaration, with an averment of performance. The defendant should have had an opportunity to show that the stock and tools, with which he was to carry on the farm, had not been furnished by the plaintiff. 1 Chit. Pl. (1st edit.) 309, 313; *Outwater* v. *Dodge*, 7 Cowen, 85.

Even if the plaintiff was not obliged to allege performance on his own part, he was bound to prove it, and the ruling that he might recover on the general counts by simply proving a sale and delivery, was incorrect.

The plaintiff was not entitled to recover, without proving a special demand, since the defendant was to pay in money or produce, at his option.

Mills, *contrà*, said that in regard to the articles in question, the special contract had been performed, and nothing remained to be done except to pay for them. *Felton* v. *Dickinson*, 10 Mass. R. 287; *Gibbs* v. *Bryant*, 1 Pick. 118; 2 Stark. Evid. (Metcalf's edit.) 95.

Sept. 28th, 1832. *Per Curiam.* We are of opinion, that the decision of the Court of Common Pleas was correct in respect to the hay, it being the property of the plaintiff, of the growth of 1830, and not embraced by the written agreement.

It is clear that the plaintiff is entitled to recover for the 9 bushels of oats, though for a different reason. The defendant was to cultivate the farm and deliver over to the plaintiff half of the produce, after it was harvested. By the sale of these oats he had put it out of his power to deliver them to the plaintiff, and the money which was received for them belonged to the plaintiff.

The 32 bushels of oats and the 6 bushels of rye are expressly referred to in the written contract, and were delivered to the defendant under it, and the plaintiff agreed to receive payment for these articles, in kind or in money. The paymer.

Digitized by Google

was to be in a particular form, by virtue of the special contract, and for these two items the action will not lie; and although they are trifling in amount, we are constrained to reverse the judgment of the court below, and to grant a new trial at the bar of this Court.

The cause was afterwards tried in this Court, before *Shaw* C. J., when it appeared in evidence, that the defendant entered upon the farm in April, 1831; that he received from an agent of the plaintiff, occupying another farm of the plaintiff, about 2 tons of hay, and about 33 bushels of oats, the property of the plaintiff, being the produce of the lastmentioned farm, of the preceding year; and that the hay and oats were thus taken by the defendant by the authority of the plaintiff.

No demand having been made, and no notice having been given, and no division of the crops having taken place, before the commencement of the action, an opinion was expressed by the judge, that so far as these articles were delivered to the defendant in pursuance of the special contract, to be paid for in the special manner therein provided, this action for goods sold and delivered could not be maintained; but for goods not so stipulated to be furnished and paid for, the law implied a promise from the sale and delivery, and the action would lie; that it appearing that the contract had provided for the delivery both of grain and seeds, to be paid for after harvest, in kind, or at an appraised value, the oats would fall under the one or the other of these denominations, and for these the action could not be maintained; but there being no stipulation for the delivery of hay, that stood upon the general ground of an implied contract to pay the value of the goods. Whereupon the defendant consented to be defaulted, subject to the opinion of the whole Court. It was agreed that damages for the hay should be assessed at $18, and if the plaintiff was entitled to recover for the oats, then the sum of $11·67 was to be added to the damages; otherwise they were to stand at $18, and judgment was to be entered, in either event, for the plaintiff.

The plaintiff's counsel afterwards filed a motion for a new trial, on the ground that he had mistaken the former decision of the Court, and had therefore offered evidence respecting the 32 bushels of oats, and omitted to offer evidence in regard to

Digitized by Google

Shearer v. Jewett.

the 9 bushels of oats, the value of which, about $3, added to the $18 damages for the hay, would entitle the plaintiff to full costs.

Sept. 28th, 1833.

The case was submitted without argument; and the Court, considering that there was reason to believe that the plaintiff was entitled to recover for the 9 bushels of oats, were of opinion that a new trial ought to be granted, but upon the terms that the plaintiff should not recover costs for the last trial or the next.

Ashmun objected, that according to the agreement at the last trial, the default was to be taken off, only in case the decision of the judge should be determined by the whole Court to have been incorrect, and that it had not been so determined; but on the part of the Court it was answered, that such agreements are subject to the order of the Court.

ALBE CADY *et al. versus* JOB B. NORTON.

Where a witness had testified to material facts on the part of the plaintiff without being sworn, through the inadvertence of the parties, and this circumstance came to the knowledge of the defendant and his counsel during the argument of the counsel, but after the witness had gone to his home in a distant town, it was *held*, that after a verdict for the plaintiff, it was too late for the defendant to object that the witness had not been sworn.

CASE for fraud and deceit in the sale of a patent right. Plea, the general issue. The jury returned a verdict for the plaintiffs.

The facts of the case appear sufficiently in the opinion of the Court, which was delivered by

Sept. 28th.

SHAW C. J. A motion is made by the defendant to set aside the verdict, on the ground, that one of the witnesses who had testified to material facts on the part of the plaintiffs, was not sworn. It appears, that notice of this fact was communicated to the defendant and his counsel, before the cause went to the jury. The defendant states, in his affidavit in support of the motion, that he and his counsel had notice of this fact, whilst his counsel was engaged in his argument, and

Digitized by Google

hat at that time, the witness had left town for his home in Westfield, a distance of ten or twelve miles, and this is relied upon as an apology for not then taking the objection.

Taking the fact as stated, the Court are of opinion, that the defendant, knowing that the witness had not been sworn, before the cause went to the jury, without giving notice thereof to the Court, or taking any exception, has waived his right to except, after a verdict. So where an exception may be taken to a juror or a witness, the right to except is a privilege, which the party may waive; and if the ground of exception is known and not seasonably taken, by implication of law, it is waived. This proceeds upon two grounds; one, that if the exception is intended to be relied on, and is seasonably taken, the omission may be supplied, or the error corrected, and the rights of all parties saved. The other is, that it is not consistent with the purposes of justice, for a party knowing of a secret defect, to proceed and take his chance for a favorable verdict, with the power and intent to annul it, as erroneous and void, if it should be against him. *Fox* v. *Hazelton*, 10 Pick. 275.

These considerations, of course, apply to matters of form and exceptions, which a party has a right to waive; and it is obvious, that the exception insisted on, is of that kind. It is competent to parties, and indeed it is not uncommon in practice, by consent, to receive the statement of a person as evidence, who is not sworn.

In the present case, if notice had been seasonably given and the exception taken, the witness might probably have been recalled; if not, the jury should have been discharged, to avoid giving an erroneous and useless verdict. Had the witness been recalled, and confirmed his testimony on re-examination, the defect would have been cured; had he refused to do so, the cause might have been withdrawn from the jury, or other proper course adopted. But a verdict having been taken, with knowledge of the omission of the witness to be sworn, through inadvertence of all parties, the objection comes too late, and cannot affect the validity of the verdict.

I. C. Bates, *Dewey* and *Collins* for the defendant.

Morris and *Leonard*, for the plaintiffs, cited *Keen* v. *Sprague*, 3 Greenl. 77; *Walker* v. *Green*, 3 Greenl. 215;

Digitized by Google

Cady v. Norton.

Amherst v. *Hadley*, 1 Pick. 38; *Bond* v. *Cutler*, 7 Mass. R 205; *Commonwealth* v. *Green*, 17 Mass. R. 538; *Wait* v. *Maxwell*, 5 Pick. 217; 9 Dane's Abr. 555; 1 Sellon's Pr. 489; *Queen* v. *Child*, 7 Cranch, 290; 6 Dane's Abr. 254; *Callender* v. *Marsh*, 1 Pick. 418; *Train* v. *Collins*, 2 Pick. 153; *Robinson* v. *Cook*, 6 Taunt. 336; *Gist* v. *Mason*, 1 T. R. 84.

HENRY KING Executor, &c., *versus* DANIEL FOWLER *et al.*

If a party in possession of land under a judgment in a writ of entry, sows the land during the pendency of a writ of right against him, and the demandant in the writ of right recovers judgment, and obtains seisin and possession before the crop is severed, the demandant is entitled to the crop.

So if the land is thus sowed by the grantee of the party who recovered in the writ of entry, and the recovery in the writ of right is against such grantee.

TRESPASS *quare clausum*, to recover the value of 200 bushels of rye.

From an agreed statement of facts it appeared, that the land on which the rye grew, had been in the possession of Frederick Fowler, for a great number of years; that King commenced a suit against him for the recovery of the land; that a verdict was rendered in part for King, and in part for Frederick Fowler; that afterwards, on April 19, 1824, Frederick Fowler conveyed the premises to the defendant, Daniel Fowler, who immediately entered into possession; that on August 1, 1830, King sued out a writ of right against Daniel for the recovery of the premises, and recovered a verdict against him; that Daniel moved for a new trial, on the ground of a misdirection of the jury; that while the motion was pending, the land was sowed with rye by the defendants; that the motion was afterwards overruled, and execution was issued in favor of King, and possession delivered to him under the execution; that after possession had been delivered to King by the officer, the defendants entered upon the land and harvested and carried away the rye. It was agreed that the value of the rye was $180, and that the expense of cradling it, amounted to $20

Digitized by Google

If the defendants were liable, the damages were to be assessed by the Court.

King v. Fowler

Sept 17th.

Mills for the plaintiff.

Boies and *W. G. Bates*, for the defendants, cited *Emerson* v. *Thompson*, 2 Pick. 473; 3 Dane's Abr. 121; 9 Vin. Abr. 368; 6 Bac. Abr. 592, *Trespass*, G, 2; *Russell* v. *Blake*, 2 Pick. 505.

Sept. 18th.

Per Curiam. During the pendency of the writ of right, the land was sowed by one of the defendants, and though the crop was not severed till after the plaintiff obtained seisin and possession, this defendant contends that he is entitled to the crop as emblements, because his entry was under a judgment and so lawful. This proceeds upon a mistake. It is true there was a judgment for the defendant's grantor in a writ of entry, an action of inferior degree; but upon the higher action, it was determined that the defendant was in without right, in effect reversing and annulling the former judgment. The general rule is, that if a man enter by title paramount, he shall have the emblements, as if a disseisor sow and the disseisee enter before severance. Co. Litt. 55 *b*.

The Court are of opinion, that the claim for emblements cannot be sustained, and that the defendants are liable. But we think here was no ground to claim exemplary damages; but the value of the growing crop is the proper measure of damages. The plaintiff is therefore entitled to recover the agreed value of the grain, deducting the expense of harvesting.

Digitized by Google

The Inhabitants of HADLEY *versus* The Trustees of HOPKINS ACADEMY.

In 1657, Edward Hopkins, of England, devised estate, real and personal, to certain individuals, in full assurance of their trust and faithfulness in disposing of the same according to the true intent and purpose of the testator, namely, "to give some encouragement to those foreign plantations [New England] in breeding up of hopeful youth in a way of learning, both at the grammar school and college, for the public service of the country in future times." In 1664 the trustees executed an instrument under seal, by which they order, that "the property be equally divided between the towns of New Haven and Hadley, to be in each of those towns respectively managed and improved towards the erecting and maintaining of a grammar school in each of them, and the management thereof to be in the hands of our assigns, which are for that at New Haven, &c., and for that at Hadley, J. R., &c. These we constitute to be our trustees for the ordering of said estate and carrying on the work, wherein it is to be employed, in their town, hereby committing to them and investing them with full power to act in the same, in all respects, as ourselves, both in managing the trust themselves, and in choosing successors from time to time, &c., who &c. shall have full power to pursue and put in execution the pious end and intention of the worthy donor, yet reserving to ourselves while we live, the full power of a negative vote, for the hindering any thing that may cross that end." In 1664 another testator devised land "to the town of Hadley, for promoting and advancement of a school for learning." In the same year another testator devised "to the town of Hadley" certain real estate "to be improved towards the maintaining of a school ever." In 1666 the town passed the following vote: "The town have granted to and for the use of a grammar school in this town of Hadley, and to be and remain perpetually to and for the use of the said school," certain land specified in the vote. In 1669 one of the surviving trustees made a proposal to the town of Hadley, that he should appoint three persons, to be submitted to the town and to be approved of by them, and that the town should appoint two, and that these five, with himself whilst he lived, should have the sole disposal and management of the estate, in all respects, for the end to which it was bequeathed; and that the same five persons, with himself whilst he lived, should have the sole management of all other estate given by any donor, or which might be given while they survived, to the town of Hadley, for the promoting of literature or learning; that these trustees should have power to perpetuate the board by filling their own vacancies; and that the school should be called the Hopkins school. The town approved of three persons named by the trustee, and appointed two themselves, and voted that "the committee thus chosen should jointly and together have the ordering and full disposal of the estate given by the trustees of Hopkins to the town of Hadley, or any other estate or estates that were or might be given, either by the town itself or by any other donor, for the use, benefit and maintenance and promoting a grammar school to and for the use and in the town of Hadley." In 1675 another testator devised land to the town of Hadley, committing it to the care, disposing and ordering of S. S. &c. [naming the persons constituting the Hopkins school committee] to be by them disposed of (in case they quietly keep and remain in their committee ship for Hopkins school) unto Hopkins school, for Hadley; but if they be put out or disturbed in that committeeship, then to be disposed of as they see meet, for the good of the town." It was *held*, that the legal estate in the property given by Hopkins, did not, by his will and the instrument made by his trustees in 1664, vest in the town of Hadley; that the devise was not made for the purpose of founding a

Digitized by Google

common town school for the exclusive benefit of the inhabitants of that town, but was designed for the encouragement of all persons in that (then) newly settled part of the country, who should desire to avail themselves of the benefit of a grammar school adapted to instruct and qualify pupils for the university; that a long continued usage of admitting pupils from other towns than Hadley, to participate in the benefits of the Hopkins school, was of weight in establishing such construction of the devise; and that all the other donations above mentioned were to be held upon the same trusts and be appropriated to the same purposes, as the principal one from Hopkins.

It is probable, that in 1686 the county courts and the president and council of New England had jurisdiction over trusts of the kind above described.

BILL in equity. The bill alleges, that in 1657, Edward Hopkins, Esquire, a resident in the kingdom of Great Britain, by his last will bequeathed and devised as follows: "And the residue of my estate there (New England) I do hereby give and bequeath to my father Theophilus Eaton, Esquire, Mr. John Davenport, Mr. John Cullick and Mr. William Goodwin, in full assurance of their trust and faithfulness in disposing of it, according to the true intent and purpose of me the said Edward Hopkins, which is, to give some encouragement in those foreign plantations for the breeding up of hopeful youth, in a way of learning, both at the grammar school and college, for the public service of the country in future times. My further mind and will is, that within six months after the decease of my wife, five hundred pounds be made over into New England, according to the advice of my loving friends Major Robert Thompson and Mr. Francis Willoughby, and conveyed into the hands of the trustees before mentioned, in further prosecution of the aforesaid public ends, which, in the simplicity of my heart, are for the upholding and promoting of the kingdom of the Lord Jesus Christ in those parts of the earth."

That in 1664, Davenport and Goodwin, being the only surviving trustees, by an instrument under their hands and seals, after reciting the trusts and powers given to them in the will, proceed to execute the trust and dispose of the property confided to them, in manner following: "We therefore, the said John Davenport and William Goodwin, being the only survivors of the said trustees, for answering the trusts committed to us by the last will and testament of our worthy honored friend, do order and dispose of the said estate as follows &c. (disposing of a portion of the property confided to them, and then

Digitized by Google

Hadley v Hopkins Academy.

proceeding:) We do further order and appoint, that the rest of Mr. Hopkins his estate, both that which is in New England and the 500*l.* which is to come from Old England when it shall become due to us after Mrs. Hopkins her decease, be all of it equally divided between the towns of New Haven and Hadley, to be in each of those towns respectively managed and improved towards the erecting and maintaining of a grammar school in each of them."

That in 1664, John Barnard, in his last will, devised "unto the town of Hadley for promoting and advancement of a school for learning, twelve acres, one rood and nine poles of meadow land, perpetually to be and remain to the use aforesaid, lying within the lands of the township of Hadley; six acres two roods and twenty-nine poles lying in the meadow called Hockanum; another parcel in the meadow called the Great Meadow, containing five acres, two roods, twenty poles;" and that in a codicil he devised as follows: "To the use and towards the maintenance of a school, I give perpetually my piece of land lying in the Forlorn; as also my piece of land that lies in Hockanum; and also that land I have given to a school; if there be not a school in Hadley at the decease of my wife, then the land to be improved by four of the poorest men in town till there be a school set up."

That in 1664, Nathaniel Ward devised as follows: Item, to the town of Hadley I give, after the decease of my wife, my now dwellinghouse, with about five roods or an acre and half of land on which it standeth, and my lot of five acres, more or less, in north meadow, and my lot in Hockanum, containing nine acres, more or less; to be improved towards the maintaining of a school ever."

That in 1666, the town of Hadley passed the following vote: "The town have granted to and for the use of a grammar school in this town of Hadley, and to be and remain perpetually to and for the use of the said school, the two little meadows next beyond the brook commonly called the mill brook, and as much land to be laid to the same as the committee chosen by the town shall in their discretion see meet and needful; provided withal, it be left to the judgment of the said committee, that so much of the second meadow shall be

Digitized by Google

excepted from the said grant as that there may be a feasible and convenient passage for cattle to their feed."

That in 1669, by agreement between Goodwin and the town of Hadley, five persons were chosen, partly by Goodwin and partly by the town, as a joint committee, "who together with Goodwin while he lived," and after his decease, should jointly and together have the ordering and full dispose of the estate or estates given by Mr. Davenport and Mr. Goodwin (as trustees as aforesaid to Mr. Hopkins) to this town of Hadley, or any other estate or estates that ever may be given, either by the town itself, or any other donor or donors, for the use, benefit and maintenance and promoting a grammar school, to and for the use, and in the town of Hadley." That it was also agreed that the committee should have power to fill all vacancies in their number occasioned by death.

That in 1675, Henry Clark devised as follows: "My nine acre lot in Hockanum in the town of Hadley, and two acres and an half of my lot in the lower end of Great Meadow in Hadley, on the nether side of the lot, I give to the town of Hadley, committing it to the care, disposing and ordering of Lieut. Samuel Smith, Ensign Cooke, Deacon Tilton and Mr. John Russell junior, to be by them disposed of (in case they quietly keep and remain in their committee-ship for Hopkins school) unto Hopkins school, for Hadley; but if they be put out of or disturbed in that committee-ship, then to be otherwise disposed of as they or the survivor of them see meet, for the good of the town."

That the committee above described and their successors, continued to have the management of the property and to appropriate its annual income agreeably to the uses and for the purposes above mentioned, until 1816, when the committee, in concurrence with the town of Hadley, petitioned the legislature for an act of incorporation; and an act was accordingly passed, entitled "an act to incorporate the trustees of Hopkins Academy;" that the trustees of the academy succeeded to and accepted of the trust above described; and that in and by the act of incorporation, all the lands and moneys, which had been theretofore given or subscribed to the committee before mentioned, for the use of the school, are confirmed to the trus-

Digitized by Google

Hadley v. Hopkins Academy.

tees of the academy and their successors for ever, "for the uses designated by the donors."

That the plaintiffs hoped the trustees would have managed the property and appropriated the annual income thereof to and for the uses designated by the donors, and according to the agreement between Goodwin and the town of Hadley, for the use, benefit and maintenance and promoting a grammar school to and for the use of the town and its inhabitants, but that they refuse, and have for a long time refused, to administer the trust according to the directions of the donors and to appropriate the annual avails of the property to and for the exclusive use and benefit of the plaintiffs, and have appropriated the same, as well to the use and benefit of others, as of the plaintiffs, and sometimes in exclusion of the plaintiffs.

The bill then prays for disclosure and relief.

The defendants, in their answer, admit that Hopkins, Barnard, Ward, and Clark made the several devises, and that the town of Hadley made the grant, set forth in the bill.

They admit, that in 1664, Davenport and Goodwin, for the execution of the trust created by the will of Hopkins, made an instrument containing the clause recited in the bill, but they allege that, after that clause, the instrument proceeded as follows: "And the management thereof to be in the hands of our assigns, which are for that at New Haven at present, (and so to continue unless some other way be by us agreed on,) the town court of New Haven, consisting of magistrates and deputies and the officers of the church at New Haven, and for that at Hadley, John Russell junior, pastor of the church of Christ at Hadley, Lieut. Samuel Smith, Andrew Bacon and Peter Tilton; these we the said John Davenport and William Goodwin do appoint and constitute to be our trustees for the ordering of said estate and carrying on the work, wherein it is to be employed, each in their several towns respectively, hereby committing to them and investing them with full power to act in the same, in their several towns respectively, in all respects, as ourselves, both in managing the trust themselves and in choosing successors from time to time, as they shall see meet, who, or the major part of whom (or, in case at any time the rest of the trustees being taken away before others be

Digitized by Google

chosen, any of whom) may and shall have full power to pursue and put in execution the pious end and intendment of the worthy donor; yet reserving to ourselves while we live, the full power of a negative vote for the hindering any thing that may cross that end."

The defendants further say, that the agreement made in 1669, between Goodwin and the town, was as follows: "Mr. Goodwin proposeth as that wherein he is willing to concur, viz. as to the ordering the estate distributed and given by Mr. Davenport and himself (as trustees of Mr. Hopkins) to the town of Hadley, donors of the said estate, both for the present and future, he the said Goodwin hath chosen three persons, or will choose them, to have power in the premises; he is willing also that the town should give their approbation of said persons; as also that the town should make choice of two more able and pious men, which five persons, together with himself, shall have the sole and full dispose and management of the estate above expressed, in all respects, for the end to which it is bequeathed. 2. As also the said five persons, together with himself while he lives, to have the sole dispose and management of all other estate or estates given by any donor, or that may be while they survive, to the town of Hadley, for the promotion of literature or learning. 3. These five persons to continue, abide and remain in the work above expressed, till death or other providence of God remove any of them, and the survivors to choose to themselves the full number aforesaid. 4. Mr. Goodwin desires the name of the school may be called, the Hopkins School." Which communication being so made to the town of Hadley on March 20, 1669, the town, on the 29th of the same March, *voted*, "that Mr. Goodwin be sent to by the town, to know the persons he will make choice of as respects the premises. He returns, that he has chosen Mr. John Russell, pastor of the church at Hadley, Lieut. Samuel Smith, and Aaron Cook; and the said town voted their approbation of Mr. Goodwin's choice. The town also voted Nathaniel Dickinson and Peter Tilton to join with the persons before mentioned, as a joint committee, who, together with Mr. Goodwin while he lives, and after his decease, shall jointly and together have the ordering and full

Digitized by Google

Hadley v. Hopkins Academy.

dispose of the estate or estates given by Mr. Davenport and Mr. Goodwin (as trustees as aforesaid to Mr. Hopkins) to the town of Hadley, or any other estate or estates that are or may be given, either by the town itself, or any other donor or donors, for the use, benefit and maintenance and promoting a grammar school to and for the use and in the town of Hadley; as also jointly and together to do, act and conclude, finish and execute, any thing respecting the premises, faithfully and according to their best discretion. Voted also by the town, that as to the five persons, before expressed, if any decease or be otherwise disabled by the providence of God, the rest surviving shall have the sole choice of any other in the room and place of those surceasing, to the full number of five persons, provided they be known discreet, pious, faithful persons. And the town directed Mr. Clark and Peter Tilton to present the premises to the court to be recorded."

They further state, that in 1671, the town granted a piece of land near the corn mill, for the erecting a dwellinghouse upon the same for a miller, which grant had this provision, viz. that whatever land or estate, with the said house and mill &c., that hath been given by the town of Hadley, or by any other, for the maintaining a grammar school there, be ordered, managed and disposed by the present school committee in being, and after them by their successors whom they shall choose, pro vided they be still pious, discreet, faithful men; otherwise the said grant to be void and invalid to the end and purposes aforesaid."

They further state, that at a county court held at Springfield in September, 1682, an order was passed accepting and allowing a return from the committee of the Hopkins school, and taking notice that John Russell, Aaron Cook, Philip Smith and Samuel Partridge constitute the committee and approving of them all, and desiring their further management and carrying on of the affairs of the school from time to time, which the court would be always ready to promote and encourage as need might require.

They further state, that while the care of the school was thus lawfully in the hands and under the oversight of a committee with full powers to manage the same without the interven-

Digitized by Google

on of the town, yet about August 23, 1686, the town voted "to take into their own hands, to manage, order and dispose to the use of a school in the town of Hadley, all the estates of houses and lands bequeathed and given by any donor or do nors, in their last wills and testaments, to the town of Hadley, or to a school in said town, as the legacy of Nathaniel Ward, John Barnard and Henry Clark;" which interference on the part of the town induced the committee of Hopkins school to apply to the county court held at Springfield in September, .686, being a court having jurisdiction of the premises, where-pon the following order was passed, viz. "The declining estate of Hopkins school in Hadley being presented to this court by the Rev. Mr. John Russell, Aaron Cook, Joseph Kellogg and Samuel Porter, the committee of said school, for that some of Hadley do disturb or obstruct the management of the estate of said school, therefore this court do order and declare, that the whole donations to a school there, from the charitable donors, be all employed and improved for and towards the maintenance of the grammar school in Hadley; it appearing that the intent of Mr. Henry Clark, in what he gave to a school, was, that it should go and be employed to the said school called Hopkins school. Also the like doth appear as to goodman Ward's gift. And goodman Barnard's gift may as well be taken to and for that school as any other. Wherefore this court order, that all said gifts and others, with the land given by Hadley town, be all accordingly improved by the aforesaid committee."

They further state, that upon application duly made to the president and council of his (then) Majesty's territory and dominion of New England in America, upon the concerns of the Hopkins school and the funds thereof, it was, on December 8, 1686, ordered by the president and council, "that the committee for Hopkins school be and remain the feoffees of the grammar school in said town, and that Mr. Partridge be and hereby is dismissed from any further service in that mater, and that the said committee make report of the present estate of Mr. Hopkins' and other donations to said school, (which, having been orderly annexed to the grammar school, are hereby continued to that service,) unto the next county

Digitized by Google

Hadley v. Hopkins Academy.

court of Hampshire, who are hereby empowered to supply the place of Mr. Partridge with some other meet person in Hadley, and that the said court do find out and order some method for the payments of Boltwood's expenses upon the mill, tha the mill farm and other lands given to the school may return to that public use; the president and council hereby declaring it to be beyond the power of the town of Hadley, or any other, to divest any of the lands or estate, or the said mill stream or privileges thereof, (which are legally determined to this said grammar school,) to any other use whatsoever; the president and council judging the particular gifts in that town a good foundation for a grammar school, both for themselves and *the whole county*; and that the grammar school can be no otherwise interpreted, but to be a school holden by a master capable to instruct children and fit them for the university. Council House, Boston, December 6, 1686."

They further state, that at a county court held at Northampton on June 8, 1687, an order was made, (which is set out at length in the answer,) reciting the proceedings of the president and council, and of the county court held at Springfield in September, 1686, and that the court held at Northampton approves of the same, and concluding as follows; "It is therefore hereby ordered, that those persons of Hadley who have any ways meddled or intrenched upon the school estate thereof, which ought to be managed by John Russell, Aaron Cook, Joseph Kellogg and Samuel Porter, the feoffees of said school, (to whom this court of sessions, according to orders, have now by the consent and choice of the rest of the committee added Chiliab Smith of Hadley, to make up the number of five feoffees,) do deliver up all the estate they have entered on, forthwith, into the hands and ordering of the feoffees, on penalty of all damage that may come to themselves by neglect thereof." And the defendants therefore allege, that as, from their obvious nature, the donations were, and by the judgment of the president and council, and of the court held at Northampton, they were adjudged to be, "a good foundation for a grammar school, both for themselves and *the whole county*," and as it was further adjudged, "that a grammar school can be no otherwise interpreted but to be a school

Digitized by Google

holden by a master capable to instruct children and fit them for the university," the plaintiffs should not now be allowed to claim that the committee, or those who have succeeded them in the trust in question, should apply the trust fund exclusively to the use of the inhabitants of Hadley.

The defendants admit that an act of the legislature was passed on June 14, 1816, (*St.* 1815, *c.* 104,) to incorporate the trustees of Hopkins academy, by which it is provided, that there shall be established an academy in the town of Hadley upon the foundation of Hopkins donation school, and that the committee of the school be incorporated into a body politic by the name of The Trustees of Hopkins Academy; and that all the lands and moneys heretofore given or subscribed to the committee for the use of the school, or which shall be hereafter given, granted and assigned to the trustees for the use of the academy, shall be confirmed to the trustees, and their successors in that trust, for ever, for the uses designated by the donors, and that they shall be further capable of taking and holding estate, real or personal, provided the annual income of the same shall not exceed 5000 dollars, and that the rents and profits thereof shall be applied in such a manner as that the designs of the donors may be most effectually promoted. And the defendants aver, that this act was procured upon the petition of the committee of the donation school, acting in concurrence with the town, pursuant to a vote of January 1, 1816, "that the town will unite with the committee of the donation school in petitioning the legislature for the establishment of an academy in this town." And the defendants represent, that the town, in thus uniting with the committee, intended that all the funds in the hands of the committee should be thereafter applied to maintaining an academy in the town, upon the footing and system of other academies in New England; and that in consequence of the town's concurrence with the committee in obtaining the act of incorporation, donations had been made by the legislature and by individuals, for the general purposes of an academy, and it would be a fraud upon such donors, if the town should now withdraw all the funds of the donation school and appropriate them to the exclusive use of the inhabitants of Hadley.

Digitized by Google

Hadley v. Hopkins Academy.

They further allege, that the trustees of Hopkins academy established a grammar school in Hadley, and have from time to time furnished the best instruction their ability permitted, in Latin, Greek, astronomy, ancient and modern history, logic, ancient and modern geography, natural, moral and intellectual philosophy, rhetoric, geometry, chemistry, arithmetic, composition, reading, declamation, and such other studies as are usually taught in academies; that to this school every person in Hadley, of proper age and qualifications to receive benefit from the school, could be admitted, and none such have ever been refused; that the trustees have supposed it to be their duty to have, at all times, a master capable to instruct children and fit them for our university or some of our colleges; that the expense of such instruction has at all times more than exhausted the whole annual income of the funds in the hands of the trustees, and the balance of the expenses has been assessed on the scholars as tuition fees; that it is true the school has been resorted to by youth from other towns, but this has not only in no way been detrimental, but, on the contrary, has been highly beneficial, inasmuch as the excess of expenses of instruction over the income of these funds, instead of being assessed wholly upon the scholars who are inhabitants of Hadley, has been apportioned among all the scholars, while the opportunities for instruction have been in no degree lessened.

In an amended bill the plaintiffs allege, that no record is to be found of any such judgment of the president and council of New England, as is stated in the answer of the defendants, but that, from writings which have been preserved, it appears that there was a controversy between the town of Hadley and the committee above mentioned, upon the point whether the town had a right to take into their hands and management the property mentioned in the original bill, and appropriate the proceeds to the support of a common school in Hadley, but that the point whether the committee were bound to administer the funds and appropriate the avails for the support of a grammar school for the exclusive use of the town, was not drawn in question, nor was the town heard thereon; that the declaration of the president and council, that the donations were a good foundation for a grammar school for the whole county,

Digitized by Google

was extrajudicial and not authorized by the issue before them; that at the time of the several donations mentioned in the original bill, the town of Hadley embraced the territory which now constitutes, besides the present town of Hadley, the towns of Amherst, South Hadley, Granby, Hatfield, Williamsburgh and Whateley, and that some individuals in these towns might have claimed that the donations were to be appropriated for the common benefit of all these towns, and that under such impressions students from these towns might have occasionally attended the school; that the town of Hadley has by no act whatever recognised the right of the committee or trustees to admit into the school or academy students from any other place than Hadley, and that, as the plaintiffs believe, prior to the act of incorporation, no students, except from the towns above mentioned, ever attended the school under a claim of right; that the plaintiffs voted to concur with the committee in an application to the legislature for an act of incorporation, in the belief that the funds could be better managed by a corporation than by a committee, but without any intention of surrendering their right to the exclusive use and benefit thereof, and that the act was cautiously framed with a view to secure the exclusive right of the town.

In their answer to the amended bill, the defendants state, that there cannot be found at Boston, any record of the judgment of the president and council, and the reason is, because there is a loss of the public records of the general court, and also of the council records, during the period from May, 1686, to 1689, when the affairs of the province were managed by a president and council; but that full transcripts of records of the proceedings stated in their former answer, are found in an ancient book purporting to be records of the county court of pleas and sessions holden at Northampton for Hampshire, for June, 1687, and also in an ancient book of records kept by the donation committee, purporting to contain an account of the various donations for the school, and of the various judgments of the president and council, and of the county courts of Hampshire, respecting the same; that they have no knowledge that some of the inhabitants of the other towns formerly constituting a part of Hadley claimed a common right in these

Digitized by Google

Hadley v. Hopkins Academy.

funds, any further than appears from their previous answer that in admitting students they have not confined themselves to the limits of Hampshire, in its former extent, but have adopted as their guide the will of Edward Hopkins, which expresses the object of his donation, in the manner before stated; and that the question of the school being a public school for others than those residing in Hadley, must have been in controversy between the town and the committee before the president and council, at the time of making the adjudication declaring it a public school, as set forth in the former answer.

The plaintiffs filed a general replication.

Sept 23d. At the hearing the defendants read several depositions, and introduced a book of records of the county court, reciting the proceedings of the president and council, and containing the adjudication of the county court thereon, as set forth in the pleadings; also a certificate of the secretary of the commonwealth, that there are no records of the proceedings of the council from May, 1686, to 1689.

Billings and *Forbes* argued in support of the bill in regard to the jurisdiction of the president and council, they referred to Ancient Charters &c. 52, 90, 93; and to the point, that the proceedings of the president and council were not conclusive against the plaintiffs, *Smith* v. *Sherwood*, 4 Connect. R. 277; 1 Stark. Evid. (Metcalf's edit.) 198; *Foster* v. *Jackson*, Hob. 53; Bul. N. P. 233; *Spooner* v. *Davis*, 7 Pick 147, and authorities there cited.

Bates and *Dewey*, for the defendants, cited, in regard to the powers of the president and council, and of the county courts, 1 Belkn. Hist. N. Hamp. 184 *et seq.*; 1 Chalmers's Annals, 417; Ancient Charters &c. 52, 92, 93, 94; 4 Dane's Abr. 243; 6 Dane's Abr. 400, 401, 402; and as to the effect of usage on the interpretation of ancient grants, *Attorney General* v. *Parker*, 3 Atk. 577.

The opinion of the Court was afterwards drawn up by

Shaw C. J. In order to understand the true grounds of controversy in the present case, it may be useful, before coming to a direct consideration of the point in controversy, to consider what the question is, and to distinguish it from others which may be considered as connected with it

Digitized by Google

In the first place, no question is made of the legal title of the defendants, to the real and personal property held by them; and it is very clear that no such question could be made in this Court, as a court of equity. Questions of legal title are to be tried elsewhere. We are not called upon to consider an obvious difficulty, which might have presented itself, before the act of incorporation, in establishing a legal seisin in the donation committee, not being a corporation, and having no capacity to take and hold real estate in succession. Probably, however, they must have been considered at least as in actual possession by taking the rents, and such possession would have been considered as sufficient against all the world except those who could have set up a better title.

It is a rule in equity, that a gift of real or personal estate, either *inter vivos*, or by will, to promote education, is a charity. It is also considered as a settled rule, that such a gift to a charitable use is to receive a most liberal construction; and if the trustees pervert the fund to other uses, or even if they refuse to accept or execute the trusts, the charity itself shall not fail, nor will the property revert to the donor. But it will be competent for a court of chancery to direct, in the former case, that the trusts shall be executed, and in the latter, that new trustees shall be appointed, in whom the legal estate shall vest, to be holden in trust for the purposes of the charity. It is quite clear, therefore, that even if the donation committee, prior to the act of incorporation, had met with a technical difficulty in maintaining their legal title, no forfeiture and no reversionary interest therein, could have been claimed by the heirs of the donors, could they still have been traced; and therefore, as the lands and estate must still have been holden for the purposes of the trust, it would have been very immaterial, whether the legal estate should be considered as vested in the particular individuals, composing the donation committee, or not. That technical difficulty, however, was removed by the act of incorporation, passed with the consent and indeed upon the application of the committee, whereby they were made capable in law of taking and holding the legal estate in succession.

Another question which has been alluded to may be con-

Digitized by Google

Hadley v. Hopkins Academy.

sidered, for the purpose of being laid out of the case. It was stated in the argument for the plaintiffs, that the defendants, by introducing the higher branches of science into the academy, have changed the character of the institution from that of a school, to that of a college, whereby the inhabitants of Hadley are deprived of the benefits intended to be conferred on them by the maintenance of a grammar school. This complaint at first seemed plausible; but we think it has no place in the present inquiry. It was not set forth in the bill, as a breach of trust; it was advanced only in argument, and that argument was founded upon a statement in the defendant's answer, of the studies pursued at the academy. But as a distinct complaint of a breach of trust, it has not been made in the bill, nor have the defendants had opportunity to answer to it. The point might have some influence as an argument upon the other question which is afterwards to be considered, if it could be shown that such a school as the present is, was not the grammar school contemplated by the donor. For instance, if it were shown *aliunde*, that the school was intended exclusively for the inhabitants of Hadley, it might perhaps be argued, that the inhabitants had no need of an institution of so high a character, and therefore, that such an institution was not intended. But till that question is settled, the argument bears with the same force the other way. If the donors, by a grammar school, contemplated an institution of higher character, than is ordinarily required for the children of a single town, then it could not be intended by the donors, that the benefits of such school should be confined to the children of the inhabitants of Hadley. It can therefore have no weight, as an argument upon that question.

But the real question raised and discussed in the present case is, whether the funds placed under the control of the defendants, for the support of a school, are so to be administered, as to confine the benefit of them exclusively to the inhabitants of the town of Hadley.

By the terms of the act of incorporation, *St.* 1815, *c.* 104, § 2, all lands and moneys given to the committee for the use of said school, shall be confirmed to the trustees of Hopkins academy, and their successors in said trust for ever, *for the uses designated by the donors.*

Digitized by Google

The same trusts, therefore, under which the committee held the funds, prior to the act of incorporation, are those under which the defendants as trustees of the academy are still to hold them and appropriate them, so that the question, in this respect, is the same as if there had been no act of incorporation.

Two sources of evidence are relied upon by the defendants, to show, that they have heretofore rightfully administered these funds, as a trust for a public school, not confining the benefits of them to the town of Hadley, but communicating them equally to youth of other towns, who may desire the benefits of them.

1. The terms under which the grants were originally made, the will of Edward Hopkins, and the appointment made under it by his surviving executors, Davenport and Goodwin.

2. Certain judicial proceedings, which are alleged to have taken place before the county court for the county of Hampshire, and before the president and council of New England, about the year 1686, in which this very question was raised and determined against the claim and pretensions of the town of Hadley.

And they insist that these grounds are strengthened by an immemorial usage, acted upon by the trustees of the school called the committee of the donation school, and acquiesced in by the inhabitants of Hadley, which was, not to confine the benefits of the school exclusively to Hadley, but to admit pupils from other towns seeking the benefit of the school, in fitting for college.

These grounds are denied by the plaintiffs, who insist that the construction of the original instruments by which the donations were made, will lead to a contrary conclusion; that the judicial proceedings were not well proved, or if they were, that the court had no jurisdiction; and that there has been no usage to admit pupils from other towns so general or so notorious, as to raise an implication that it was acquiesced in by the inhabitants of Hadley.

To trace the foundation of this school, we are carried back through an interval of nearly two centuries. The clause in the will of Edward Hopkins, the liberal benefactor of New

Digitized by Google

Hadley v. Hopkins Academy.

England, recited in the bill and admitted in the answer is to this effect. "And the residue of my estate there," &c. (as before, *p.* 241).

This is a devise to the trustees by which the real and personal property became vested in them, on the trusts designated, indicating certain objects to be accomplished, and entrusting them with full power to specify those objects, and execute the purposes intended by the will, according to their discretion and their views of his known wishes, and his "true intent and purpose." In 1664, Davenport and Goodwin, the two surviving trustees, proceeded to execute the trust and power reposed in them, by an appointment of the particular uses of this property, by an instrument, under their hands and seals, (*vid. ante*, p. 241, 244).

Had this instrument contained only that provision, which is extracted and set forth in the bill, directing that the property shall be equally divided between New Haven and Hadley, to be in each of those towns managed and improved towards the erecting of a grammar school in each of those towns, taking the views that we have derived from later experience, by which we consider towns, in all respects, as strict corporations, there would have been ground for contending that the gift and ap pointment was to the town of Hadley, in its corporate capacity. But in that case it would have been open to contend, that the legal estate was to Hadley, as a corporation capable of taking and holding property for the use of a school. But the subsequent provision, appointing trustees and vesting the legal estate in them, expressly negatives this hypothesis, and shows that the legal estate was not vested in the town, nor does it appear that the town have claimed to be the holders of the legal estate, since the attempt to take the management of it into their own hands in 1686. Besides, at the period of these conveyances, towns in Massachusetts were not considered so fully corporations as they have since been, but their corporate powers have been increased from time to time by particular legislative enactments. But it is believed, that the name, by which a township or settlement was designated, was as often used to express the idea of place, as to describe the body of inhabitants or settlers, in their municipal corporate capacity When therefore the

Digitized by Google

phraseology is, that the money shall be equally divided between Hadley and New Haven, and then in the same instrument trustees are appointed to hold and manage it, it seems to import nothing more than to direct that it shall be apportioned equally to the institutions to be established at the two places respectively. We must therefore resort to other considerations to determine the question in controversy.

In doing this, it is necessary to look carefully at both instruments, the devise to the trustees, and the appointment and settlement by them, and to consider both in reference to the state and condition of the colony at that time. The purpose of the pious donor was, as he modestly expressed it, "to give some encouragement, in these foreign plantations, for the breeding up of hopeful youth in a way of learning, both at the grammar school and college, for the public service of the country in future times." This looks not only to great objects and useful objects, but to public objects. The establishment of the grammar school, is coupled immediately with that of the college, which, although it must necessarily be established in some place, and so is local in its existence, yet is necessarily public and general in its purposes. The end contemplated was the public service of the country in future times. It was to breed up hopeful youth in a way of learning. These expressions seem inconsistent with the purpose of establishing a local school for teaching the humblest rudiments of education to the children of both sexes, who usually resort to such a school. If it be said that these expressions are adapted to that part of the provision, which points to the encouragement to be given to the college, the answer is obvious, that both are included in precisely the same terms. It seems much more like having regard to a course of liberal education and the fitting of men with that degree of learning which might qualify them for public service as professional men, especially for the service of the church. In that view the two leading objects are perfectly consistent, and calculated to advance each other; supposing a grammar school designed to fit young men for college, and the college, to enable them to complete a liberal education, preparatory to public or professional life He afterwards with much solemnity and earnestness speaks of the

Digitized by Google

Hadley v. Hopkins Academy

aforesaid *public ends*. This looks little like a design to found a local school, confined in its benefits to the children of a single settlement.

And we are of opinion, that the original trustees of Mr. Hopkins, who were specially charged with the execution of the liberal and beneficent designs of the donor, understood it in the same way, by the instrument which they executed.

After performing that part of their duty which consisted in providing for the college, they proceed to execute their powers in regard to the schools. They direct the property to be divided equally between New Haven and Hadley, to be *in* each of the towns managed, and improved towards maintaining a grammar school in each of them, and they direct in whose hands the management thereof shall be; and as to Hadley, this management is committed to four trustees specially named, with power to appoint successors and fill vacancies, and their powers are to extend both to "the ordering of said estate, and carrying on the work wherein it is to be employed," with full power to pursue and put in execution the pious end and intendment of the worthy donor, that is, to be trustees of the estate, and directors or managers for the establishment, maintenance and regulation of the school. This object was further secured, as far as it was in their power to secure it, by reserving to themselves, whilst they lived, the full power of a negative vote, for the hindering any thing that might cross that end. In this appointment, the trustees of Mr. Hopkins seem to have done little more, in the execution of their powers, than to apportion the amount of property to be appropriated to this school, fix the place where it should be established, designate the persons who should hold the property and manage the school, and provide for perpetuating them. But as to the great object to be kept in view, in administering this trust, they referred to the objects expressed by the donor. In considering those objects, we can perceive nothing which looks like a restraint upon the permanent board of trustees, obliging them to consider the trust as intended exclusively for the benefit of the inhabitants of Hadley. It is incumbent on the plaintiffs to show that they are exclusively entitled to the benefit of this trust, and if that is not shown, they must fail in es-

Digitized by Google

tablishing this claim. There is nothing, either in the original will, or in the appointment under it, to indicate that such an exclusive right was intended; but on the contrary, we think it more consistent with the avowed intention of the testator, to conclude that it was designed for the encouragement of all those, in that newly settled part of the country, who were desirous of availing themselves of the benefit of a grammar school, to qualify them for the university. The mere circumstance of being fixed in Hadley, has no tendency to show, that any other exclusive or peculiar benefit was intended, than that which arises incidentally to any place, from having a public school in its immediate vicinity.

Nor can we perceive that the trusts and purposes of this appointment are varied by the proposal, subsequently made to the town by Mr. Goodwin, one of the surviving trustees, in 1669, to which the town acceded.

Whether the property had been actually placed in the possession or under the control of the trustees named in the deed of appointment, does not distinctly appear; nor does it appear what occasion there was for any new arrangement. One purpose perhaps may be safely conjectured, that of connecting two or three other donations, made for the support of a school, and one by the town itself, with that of Mr. Hopkins, so as to place the whole under one administration, and appropriate the whole to one object. The proposal made by Mr. Goodwin was substantially this; that he should appoint three persons, to be submitted to the town and be approved by them, that the town should appoint two, and that these five, with himself whilst he lived, should have the sole disposal and management of the estate in all respects, *for the end to which it was bequeathed*; and the same five persons, with himself whilst he lived, were to have the sole management of all other estate given by any donor, or which might be given while they survived, to the town of Hadley, for the promotion of literature or learning. These trustees were appointed for their lives, with power to perpetuate the board by filling their own vacancies. And Mr. Goodwin modestly requested that it might be called the Hopkins school. This proposal being submitted to the town, they voted to send to Mr. Goodwin to

Digitized by Google

Hadley v. Hopkins Academy.

know the persons he would make choice of, and he names three, two of whom appear to be the same, who had been named in the deed of appointment. These are approved by the town, who elect two on their part conformably to the proposal, one of whom, Mr. Tilton, appears to be the same with one named in the deed of appointment. These acts, done in pursuance of Mr. Goodwin's proposal, seem to be a distinct acquiescence and concurrence in that proposal. But some reliance, and indeed the principal reliance, seems to be placed by the plaintiffs, upon the terms of the vote passed on that occasion by the town. It was in substance, that the committee thus chosen should jointly and together have the ordering and full disposal of the estate given by Mr. Davenport and Mr. Goodwin, as trustees of Mr. Hopkins, *to the town of Hadley*, or any other estate or estates that were or might be given either by the town itself, or any other donor or donors, for the use, benefit and maintenance, and promoting a grammar school, *to and for the use and in the town* of Hadley.

They also state, that the trustees shall supply vacancies in their own body, by the choice of other persons, so that they be known discreet, pious, faithful persons; and they direct two persons named to present the premises to the court to be recorded.

It appears to us, that these proceedings did not in any degree change the nature of the trusts upon which the property was to be held; it merely changed, in a slight degree, the organization of the board of trustees, so as to give the town an effectual agency in its constitution, by which they had the exclusive nomination and appointment of two, and a negative upon Mr. Goodwin's nomination of the other three. It substantially placed the control of the whole, under the agency of the appointees of the town. The town might therefore well consent, that their own, and the other small donations for the like object, should be placed under the same government.

They chose to speak of the property given by Mr. Good win and Mr. Davenport, under Mr. Hopkins's will, as property given to the town of Hadley. If they meant given to the town in its corporate capacity, we have already shown that it was not so given, but to trustees to establish a school in

Digitized by Google

Hadley. And the other clause, *to and for the use of the town* of Hadley, is so introduced, as to leave it doubtful, whether it was intended to intimate their views of the purpose, to which the funds were to be appropriated, or to be descriptive of the other estate, which might be given by the town itself, or by any other donor. But what renders it quite certain, that it was not intended to declare any other or different trust, from that already declared by Goodwin and Davenport, is this; that Mr. Goodwin's proposal was, that the committee should hold the property, in all respects, for the end to which it was bequeathed by Mr. Hopkins; and that the town intended to accede to this proposal, and not to change or qualify it, or make a new one, is manifest from this, that they did not submit this vote of theirs to Mr. Goodwin, for his concurrence, as they would, if they had proposed a change or modification of his proposal; but, on the contrary, they directed the proceedings to be presented to the court, probably the county court, to be recorded, as a complete and settled arrangement. Besides, when it is considered how peculiarly a grammar school, permanently fixed in any town, enures practically to the use of such town, and when by this arrangement the school was permanently established in Hadley, and was placed under the control and management of a board of trustees, in the appointment of whom the town had a direct participation, and who, by the mode of perpetuation, might generally be expected to be inhabitants of that town, it was not very wide from the truth to describe it as a school to be for the use of, as well as established in the town of Hadley. But there are no words of exclusion or limitation, and no intimation that the beneficial use was to be confined exclusively to the inhabitants of Hadley. We think therefore that there is nothing in these proceedings, which was intended to vary, or, if so intended, which could legally vary, the trusts, upon which the property in question was conveyed to, and vested in the committee thus appointed.

In regard to the other donations set forth in the bill, it appears to us that they clearly follow the principal one, derived from Hopkins.

The devises by Barnard and by Ward were both made in

Digitized by Google

Hadley v. Hopkins Academy.

1664, the same year that the deed of appointment was made by the trustees of Hopkins, and the object being the same, the establishment of a grammar school, the intent to give it the same destination might be presumed. But it does not stand on this presumption. By vote of the town in 1669, it was decided by the town, that all estate which had been given, or might be given for the same purpose, should be held and managed by the same committee; which is, in effect, a declaration, that they shall be held upon the same trusts, and appropriated to the same purposes. And even if it were a question of legal title, it is to be recollected, that in transactions of this antiquity, a conveyance by vote, by a corporation, is held sufficient to vest an estate, and pass the fee. *A fortiori*, is it good, as the manifestation of a trust.

That portion of this estate appropriated by the town itself, was thus done in 1666, before the above agreement. It was not strictly a grant, because there was no grantee. It was rather an appropriation, then made, and vested in the committee by the subsequent vote of 1669, subject to the same trust. So much are charities of this sort favored, that where the grantee in trust for education, is not in *esse*, as in the case of a grant to a body not yet incorporated, but afterwards a corporation or a board of trustees is created, chancery will uphold the trust and carry the object into effect, by directing the necessary conveyances, and settling the proper trusts.

Here the town did voluntarily, and by its own act, all that was necessary to give the grant effect, by designating the grantees and vesting the estate in them, by vote.

The grant of Henry Clark was after the vote of 1669, to wit, in 1675. But it is to be observed, that although by the terms of Henry Clark's will, he gives the estate to the town of Hadley, yet it is under this limitation; committing the same to the care, disposing and ordering of Lieut. Samuel Smith, &c., (naming the Hopkins committee,) to be by them disposed of, to Hopkins school, for Hadley, with an express condition, that if they are disturbed in their committeeship, it shall be otherwise disposed of as they shall see meet, for the good of the town.

It might be difficult perhaps to put a legal construction upon

Digitized by Google

this devise, so as to determine whether the fee vested in the committee or the town. But as already shown, that question is not now before the Court One thing is perfectly clear, that is, that the trust of this devise was for Hopkins school. Whatever were the purposes of that school, the same were those of this gift. It must clearly therefore follow the same trusts, which had already been declared as those upon which this school was founded by Hopkins, and those who were entrusted by him with the power of giving a specific form to his declared purpose of promoting a public grammar school.

The second principal ground, on which the respondents rely, to show that these funds were not held exclusively for the benefit of the inhabitants of Hadley, is, the acts and adjudication of the county court and of the president and council of his Majesty's territory and dominion of New England, which are set out in the answer.

Two objections are taken to these proceedings, by the plaintiffs in this case; one is, that they are not duly authenticated; and the other is, that neither the county court, nor the president and council, had any jurisdiction of the subject matter, and that their proceedings therefore, ought not to be considered as having any legal effect. We have not thought it necessary to examine either of these questions very strictly, for reasons which will be sufficiently manifest. These transactions connect themselves with one of the most remarkable periods in the history of Massachusetts. The proceedings, so far as we have evidence of them, were before the president and council of New England in the autumn of 1686, very shortly before the arrival of Governor Andros. We have a certificate from the secretary's office, stating that there are no records of the proceedings of the council from May, 1686, to 1689. It will not be difficult for those who are conversant with the history of that disturbed period, to account for the entire absence of those records. The commission of Governor Dudley as first president, was received on the 15th of May, 1686, and he was superseded by the arrival of Sir Edmund Andros in December of the same year. By him and his council all the affairs of the colony were managed, until 1689, when he was arrested, and forcibly put out of the gov

Digitized by Google

Hadley v. Hopkins Academy.

ernment. It was the manifest policy of those who thus forcibly superseded him, and who were in truth the champions of the chartered rights of the colonies, to leave as few traces as possible, of the arbitrary, and, as they believed, tyrannical proceedings of this president and his council. Still it was a government *de facto*, and as such, acts done within its jurisdiction, would probably be binding. From the imperfect view, which alone can now be obtained of these proceedings, it cannot be certainly determined how the case of this school was brought before the president and council. The county court, under the colonial government, had an extensive and perhaps not very strictly defined jurisdiction; it extended to matters of criminal, civil and probate jurisdiction. Ancient Charters &c. 91. And it is expressly ordained, that all persons "betrusted to receive or improve" any gift or legacy "given and bequeathed to the college, schools of learning or any other public use, shall be liable from time to time to give account of their disposal and management thereof to the county court of that shire where they dwell, and where such estate shall be, and to appoint feoffees of trust, to settle and manage the same according to the will of the donors." Ancient Charters &c. 52.

Under the charter, the general court was deemed and declared to be the chief civil power in this commonwealth, with authority to act in all affairs according to such power, both in matters of counsel, making of laws, and matters of *judicature*. Ancient Charters &c. 88.

By an ordinance in 1654, in consequence of the general court being so much oppressed with the weight of business, it was ordered, that causes properly cognizable by the county court, should not be transferred to the general court, but that difficult cases might be presented by inferior courts for its opinion. Ancient Charters &c. 92.

After the dissolution of the colony charter in 1685, and the establishment of the royal government, it was provided in the king's commission, first to Dudley, and afterwards to Andros, which commissions, together with the royal instructions, constituted the basis of that government, that all former ordinances should remain in force, and that the president and council should have and exercise the same powers, which had formerly been exercised by the government under the colony charter.

Digitized by Google

From this general view, it would seem, that the jurisdiction, both of the county court and of the president and council, was amply sufficient to embrace a case like this.

It appears that the county court did in fact exercise a superintending authority over cases of this kind, because there is a record showing that as early as 1682 the committee of the Hopkins school presented a report of their proceedings to the county court, which was accepted and allowed. The court also take notice who are trustees, and confirm and approve of them, and desire and expect their further management, in carrying on the affairs of said school, which the court will be always ready to promote and encourage as need may require.

It is also to be recollected, that upon the final adjustment of this trust, by the proposal of Mr. Goodwin and the votes of the town in 1669, the town ordered the proceedings to be presented to the county court to be recorded, thereby recognising their jurisdiction of public trusts of this kind, and confirming the conclusion that it was a public trust. But the judicial proceedings relied upon, commenced at a later period. It appears that in August 1686, the town of Hadley passed a vote, to take into their own hands, to manage, order and dispose, to the use of a school &c., all estates bequeathed &c., as the legacies of Ward, Barnard and Clark. It is to be remarked, that by this vote, they did not seem to claim the property of Hopkins, except in general terms. In consequence of this vote, in September of the same year, proceedings were commenced in the county court at Springfield, by the committee, who presented the declining state of the school in Hadley, for that some of Hadley do disturb or obstruct the management of the estate of said school. Upon this the court passed an order, that all the gifts to that object should be improved by that committee.

It does not appear how proceedings were instituted before the president and council, whether by reference from the county court, or by an original application. A decision however seems to have been made, December 6, 1686, which was afterwards laid before the county court, and by that court fully adopted and affirmed.

Digitized by Google

Hadley v. Hopkins Academy.

But we do not think it necessary to refer to these proceedings at large. We have looked into them only so far as to see that they do not militate against the opinions which we have formed, upon the effect of the original grants and the trusts upon which they were made. On the contrary, the effect of the decisions, both of the county court and of the president and council, was, that the committee be and remain feoffees of the school, judging the particular gifts in that town, a good foundation for a grammar school, both for themselves and for the whole *county*, and that a grammar school could be no otherwise interpreted, but to be a school holden by a master capable to instruct children and fit them for the university. This adjudication was adopted and measures taken to carry it into effect, by the county court. We should not be surprised to find, if the early manuscript could be obtained, that the word written *county* was *country*; it being more consonant with the true nature of the trust, contemplated by Hopkins, and because the term "country" was then generally adopted to express the public or the whole community. But in either form, it negatives the claim of the town of Hadley to the exclusive benefit of these funds.

Had these adjudications been the other way, or had the claim of the respondents rested solely upon them, it would have been necessary to examine with a more rigid scrutiny, both the authenticity of the documents, in which these proceedings are now found, and the jurisdiction of the courts, over the subject matter, and over the particular question of the trusts, on which the donations were made, all these points being controverted by the plaintiffs. But as we have already stated, we have only looked into them so far, as to see that they do not militate against the decision to which we have now come, upon other grounds. As the case of the defendants does not rest solely, or principally, upon these adjudications, as their case is established independently of them, it would not vary the result, if the objections made to their authority and sufficiency by the plaintiffs should be fully sustained.

3. The last ground upon which the defendants rely, is the usage and practice of the trustees or donation committee, from 1686 to the present time.

Digitized by Google

Usage, especially in ancient transactions, is a good contemporaneous construction of a doubtful grant.

In looking at the evidence adduced upon this point, nothing is found in the records of the trustees to show whether they did, or did not, confine the benefits of this grammar school, to children of the inhabitants of Hadley. The evidence therefore must rest upon living memory, which extends back fifty or sixty years; and by this it appears most satisfactorily, that in point of fact, although practically it has enured principally to the use of the inhabitants, yet it has not been confined to them, but many boys from other towns have been fitted for college there; and those who have been longest conversant with the actual management of the school as trustees, testify that they have always considered it as a school, the benefits of which have not been confined, and of right were not to be confined, exclusively to children of the inhabitants of Hadley.

Perhaps some of the minor questions made in this case may have been passed over without notice. We have endeavoured to consider the general question upon its merits, and upon the broadest principles; and upon the whole matter we are of opinion, that the inhabitants of the town of Hadley are not exclusively entitled to the benefits of these ancient donations, that the defendants in their mode of administering them, and extending the benefit of them to children of other towns, have not been guilty of the breach of trust charged in the bill, and therefore that the suit must be dismissed.

Digitized by Google

JONAS GODDARD *versus* SAMUEL W. LYMAN.

A negotiable note payable to three payees may be legally transferred by an indorsement by two of them to the third payee and a stranger; and if this were doubtful, the further indorsement by the third payee to the stranger will clearly pass the property to him.

The maker of a negotiable note, appearing, on the face of it, to have been given in consideration of the transfer of a patent right which proved to be of no value, cannot set up this want of consideration as a defence to an action by a *bonâ fide* indorsee.

The facts, that a negotiable note appears on the face of it to have been given for a patent right, and that it has been indorsed to be at the risk and cost of the indorsee, will not authorize a jury to infer that the indorsee had any knowledge or reason to suspect that the patent right was of no value and the note without consideration.

ASSUMPSIT for money had and received. At the trial, before *Shaw* C. J., the plaintiff relied upon a promissory note in the following form; "South Hadley, June 23, 1826. For value received of Edmund Warren, James J. Cutler and Alexander Fleming, I promise to pay them or order 200 dollars and interest in eighteen months from date. S. W. Lyman. The above note was given for the patent right of E. Warren's threshing machine." The note was indorsed, "Pay the within to E. Warren and H. A. Green at their risk and cost. James J. Cutler. A. Fleming." "I order the contents of this note, so far as I am interested therein, to be paid to H. A. Green or order. E. Warren." "Pay to Jonas Goddard at his risk and cost. H. A. Green."

It was objected, that upon the face of the note, it was not so made and indorsed as to enable the plaintiff to recover.

The defence was, that the note, as appears by the memorandum at the foot of it, was given in consideration of a patent right of E. Warren's threshing machine, that this machine proved to be of no value, that the plaintiff, taking the note with notice of the consideration, and at his own risk, took it subject to the same rights of defence on the part of the promisor, as if the suit had been brought by the promisee.

It was proved, that the note was indorsed to the plaintiff on November 10, 1826; that during the summer of that year, the machine was thought by some persons to be a valuable invention, and that this was doubted by others, but it was not then satisfactorily tested; that during the summer and autumn several

Digitized by Google

machines were constructed and experiments were made, and one machine was constructed as late as the ensuing winter. But it was conceded that the invention proved to be of no value.

The questions reserved for the consideration of the Court were; —

1. Whether the note was so indorsed as to enable the plaintiff to recover in this action.

2. Whether the case disclosed such a want or failure of consideration as would constitute a good defence in a suit by the promisees against the maker.

3. Whether under the circumstances the defendant can legally make the same defence against the plaintiff, who claims as indorsee.

Bates and *Dewey*, for the plaintiff, cited to the point, that the defendant could not set up the want or failure of consideration against the plaintiff, who claims as indorsee, *Russell* v. *Ball*, 2 Johns. R. 50; Bayley on Bills, (Phil. and Sewall's edit. 1826,) 349; *Brewster* v. *M'Cardell*, 8 Wendell, 478, *Perkins* v. *Challis*, 1 N. Hamp. R. 254. *Sept. 24th*

Forbes, for the defendant, cited to show that the indorsement was invalid, *Carvick* v. *Vickery*, 2 Doug. 653, note; *Smith* v. *Whiting*, 9 Mass. R. 334; to the point, that there was no consideration for the note, *Bliss* v. *Negus*, 8 Mass. R. 46; [and see *Dickinson* v. *Hall*, *ante*, *p.* 217;] and to the point, that this defence might be made against the plaintiff, claiming as indorsee, 3 Kent's Comm. (1st edit.) 53; *Ayer* v. *Hutchins*, 4 Mass. R. 372; *Knapp* v. *Lee*, 3 Pick. 452.

Wilde J. afterward delivered the opinion of the Court. The note was indorsed by two of the payees, Cutler and Fleming, and made payable to the other payee, Warren, and to H. A. Green, and this we think was a good and legal transfer to them. It is a well established principle, that a partnership may by indorsement transfer the title to a bill or note to one partner. Bayley, (Phillips and Sewall's edit. of 1826,) 77. And although the payees in this case were not general partners, yet by taking the note payable to them or their order, they made themselves partners as to this transaction, as was decided in *Carvick* v. *Vickery*, 2 Doug. 653, note. This

Digitized by Google

Goddard v. Lyman.

case was eventually decided upon the usage of London, but independently of the usage we consider the principle well settled, that partners or other joint payees of a negotiable note may legally assign it to one of the firm, or one of the joint payees. And it is so laid down by *Parker* C. J. in *Russell* v. *Swan*, 16 Mass. R. 316. By such an indorsement the assent of all the payees to the transfer is manifested, which is sufficient, especially when the indorsees put the note in circulation, as was done in the present case, and it comes into the hands of a *bonâ fide* purchaser. Upon the same principle the indorsement from Warren to Green is valid, and the technical objection to the form of the indorsements fails.

There is also another answer to the objection, which seems to us to be perfectly satisfactory. Admitting, as the plaintiff's counsel contend, that the indorsement by Cutler and Fleming to Warren and Green was not a valid transfer, it nevertheless became valid and effectual by the subsequent indorsement by Warren. For all the payees had then ordered the contents of the note to be paid to Green, and he might well declare upon it as on a note indorsed by them, and made payable to him directly; for such was the legal effect, if the indorsement by Cutler and Fleming was defective until the indorsement was made by Warren; and a party is not bound to set out a contract literally, but may always declare upon it according to its legal effect.

As to the second question, we give no opinion, because supposing the defence set up would be good in an action by the payees, we think it very clear that it cannot be maintained in an action by a *bonâ fide* indorsee.

It has been argued by the defendant's counsel, that the report of the judge discloses circumstances sufficient to justify an inference that the plaintiff had knowledge of some defect in the note; and the form of the indorsement is principally relied on to maintain this inference. It was indorsed to be "at the risk and costs" of the indorsees; but this may reasonably be supposed to have relation to the possible insolvency of the maker, and is equivalent to the common form of indorsement *without recourse to the indorser*. But this would not authorize a jury to infer that the plaintiff or any prior indorsee had any knowl-

Digitized by Google

edge that the patent-right for which the note was given was of no value, or that they had any reason to suspect that such was the fact, nor is there any circumstance in the case which can justify any such inference.

According to the agreement of the parties therefore the defendant is to be defaulted.

SPENCER ROOT *et al. versus* JONATHAN BLAKE Junior *et al.*

Land was conveyed to one in trust for others, who paid or became obligated to pay the purchase money. The trustee died, and his estate was represented to be insolvent, and commissioners of insolvency were appointed thereon. Upon a bill in equity against the administrator and heirs of the trustee, praying that the land might be conveyed by them to the cestui que trusts, a conveyance was decreed accordingly.

The *St.* 1783, *c.* 32, § 4, which authorizes the court to grant license to executors or administrators to convey real estate in pursuance of contracts made by the deceased, was not modified or in any respect annulled by the *St.* 1784, *c.* 2, providing for the distribution of insolvent estates; and upon a bill in equity by an obligee in a bond for the conveyance of land, brought against the administrator of the obligor, whose estate was represented to be insolvent, it was decreed that the administrator should convey to the obligee.

BILL in equity. The bill alleged, that on December 10, 1831, Abner Goodell bought at a public auction, certain real estate situated in Northfield and Erving's Grant; that a conveyance thereof was subsequently made to him by Aaron Kingsbury, the vendor; that the purchase was made for the joint and equal benefit of himself and the three plaintiffs, the plaintiffs having actually paid and become obligated to pay three quarters of the sum of $2000, which was the amount of the purchase money; that the conveyance was made to Goodell, to enable him to hold the land in trust for himself and the plaintiffs in equal shares, and to facilitate a sale thereof; and that Goodell, on the same 10th of December, by his deed of that date declaring the trust confided in him, bound himself, his heirs, executors or administrators, to the plaintiffs, their heirs, &c., for the faithful performance of the trust; and covenanted to account with and pay over to them their proportion of all sums of money accruing by virtue of sales made by him, of the land or the timber thereon.

Digitized by Google

Root v. Blake.

The bill further alleged, that on January 3, 1832, Goodell executed a bond, conditioned, that whereas he had agreed to convey to William Putnam, one of the plaintiffs, one half of the premises purchased at the auction, and Putnam had agreed to pay to Goodell a promissory note, dated December 10, 1831, for $250, on or before July 1, 1832, and also to pay to Kingsbury one half of a promissory note payable in four annual instalments, and signed by Goodell and the plaintiffs, now whenever Putnam should discharge Goodell from these notes and indemnify him from all expense in the premises, Goodell agreed to quitclaim to him all his interest in the land; that Putnam had performed the conditions by him to be performed, in part, and was ready to perform the residue thereof; but that Goodell had been prevented by death from performing his part of the bond.

The bill further represented, that Goodell did not, in his lifetime, execute any part of the trust confided to him by the plaintiffs; that the defendant, Blake, has been duly appointed his administrator; that the plaintiffs, by reason of these several matters and things, were unable to sell any part of the lands or of the timber thereon, or to make any profitable use thereof; and that being desirous, that the legal title to the lands may be vested in themselves, they therefore prayed, that the defendant, Blake, might be authorized and directed to execute and deliver to them deeds of their respective shares of the land, the plaintiffs indemnifying him and the heirs of Goodell against all notes or sums of money remaining due for the purchase of the lands, and against all expense in the premises.

By a supplementary bill, the widow and heirs of Goodell were made parties defendant. The supplementary bill averred, that the land in question was wild and uncultivated, and not parcel of any improved lands.

The defendants, in their answers, admitted the truth of the material allegations of the bills, and submitted themselves to the direction of the Court. The answer of Blake averred, that on September 19, 1832, he represented the estate of Goodell to be insolvent, and that commissioners were thereupon appointed to receive and examine claims against the estate; that on October 18, 1832, an inventory of all the estate

Digitized by Google

of Goodell, excepting the land in question, was duly returned into the probate court; and that according to the best of the respondent's knowledge and belief, the estate of Goodell was actually insolvent.

Sept. 24th

H. G. Newcomb for the plaintiffs.

Wells and *Alvord* for the defendants.

WILDE J. afterward drew up the opinion of the Court Upon the facts alleged in the bill and admitted by the answers, we think it very clear, that the plaintiffs are entitled to the relief prayed for. The legal estate in the premises vested in Abner Goodell, but three fourths were held in trust for the plaintiffs, who were joint purchasers with him, and severally paid, or became obligated to pay, their respective portions of the purchase money. In these three fourths the trustee had merely the legal estate. The beneficial interest vested in the *cestui que trusts*, and they, in a court of equity, are considered the real owners. If the trustee had conveyed the property, and the purchaser had had knowledge of the trust, he could not hold it discharged of the trust. Nor can the trustee's creditors now have any better right. The *cestui que trusts*, by the aid of a court of equity, have the same power over the estate for all beneficial purposes, as if it were a use executed. In equity a *cestui que trust* hath *jus habendi* and *jus disponendi*, and any disposition by him is binding on the trustee.

As to the quarter part which Goodell owned in his own right, it appears that he agreed to convey it to William Putnam, one of the plaintiffs, and gave him an obligation to convey the same to him on certain conditions as charged in the bill. Upon the performance of these conditions, we think the obligee is entitled to a conveyance. By the *St.* 1783, *c.* 32, § 4, this Court is authorized to grant license to the administrator of the obligor to make the conveyance according to the terms of the contract; and by the *St.* 1817, *c.* 87, we are empowered to order such conveyance to be made. By the former statute the legislature obviously intended to give a preference to the claim of an obligee in such a case, to that of the heirs or creditors of the obligor. The circumstance that Goodell's estate is insolvent, does not affect the rights of the parties. There is nothing in the act for the distribution of in-

Digitized by Google

Root v. Blake

solvent estates, which can reasonably be construed so as to modify, or in any respect annul, the *St.* 1783, *c.* 32, § 4.

There is no reason, therefore, why the Court should not decree a specific performance of this contract, in the same manner as if Goodell were now living. The Court accordingly order and decree, that upon the performance of the conditions of sale, as specified in the obligation of Goodell, the whole estate shall be conveyed to the plaintiffs by his administrator and heirs, as prayed for in the bill. [See Revised Stat. *c.* 74.]

GEORGE PIERCE *versus* RUFUS SAXTON, Administrator.

Where a claim presented to the commissioners of an insolvent estate is rejected, and the creditor recovers in an action at law against the administrator, brought in pursuance of *St.* 1784, *c.* 2, he is entitled to an execution for the costs of the action, against the administrator, *de bonis propriis;* but the judge of probate may allow the costs to be charged in the administration account, unless the administrator unreasonably objected to the claim.

DEBT on a judgment against the intestate.

In the Court of Common Pleas, it appeared that the estate of the intestate was represented to be insolvent; that the plaintiff presented his claim against the estate to the commissioners of insolvency appointed in consequence of such representation; that the claim was rejected; that the plaintiff having filed due notice at the probate office, commenced this action at the next term of the Court of Common Pleas; and that it was agreed by the parties, that judgment should be rendered for the plaintiff, as upon default. It further appeared, that the estate was actually insolvent.

The question submitted to the Court of Common Pleas was, whether judgment should be rendered against the defendant for costs, *de bonis propriis*, or not; and that Court adjudged, that the plaintiff was not entitled to such judgment.

To this decision the plaintiff excepted.

Sept. 24th. *Arms* and *Grennell*, for the plaintiff, cited *Brooks* v. *Stevens*, 2 Pick. 68; *Healy* v. *Root*, 11 Pick. 389; *Hardy* v *Call*, 16 Mass. R. 530.

Digitized by Google

Bates and *Dewey* for the defendant.

WILDE J. afterward drew up the opinion of the Court. Upon the facts agreed the Court is of opinion, that the plaintiff is entitled to judgment for costs against the defendant, *de bonis propriis*.

The *St.* 1784, *c.* 2, provides, that "when a claim is disputed in the course of the common law, execution shall not issue as in common cases, but the judgment of the court respecting the same shall be the amount of the claim, and added to or deducted from the commissioners' report, as the case may require." It is intended, we think, that the debt or claim only is to be added to or deducted from the commissioners' report. And this construction of the statute we think can do no injustice to the administrator; for in all cases the judge of probate would undoubtedly allow an executor or administrator to charge the costs paid, in his account of administration, unless he had unreasonably objected to a creditor's claim, thereby compelling him to commence a suit or abandon his just claim. And if the executor or administrator does without cause object to a creditor's claim, there is no good reason to be given, why he should not be liable for costs. The construction, therefore, which we give to the statute will work no injustice, and may operate as a beneficial restraint upon executors and administrators, who may be disposed to abuse their trust. [See *Burns v Fay*, *ante*, *p.* 8.]

Digitized by Google

THADDEUS SCOTT *versus* GIDEON DICKINSON.

Where in pursuance of the provisions of *St.* 1785, *c.* 52, regulating the erection of fences, the plaintiff had, in consequence of the neglect of the defendant, erected the portion of the fence between their lands, which was assigned to the defendant by the fence viewers, and the fence viewers, afterwards, upon the application of the plaintiff, *but without notice to the defendant*, appraised the value of this portion and ascertained the amount of their fees, it was *held*, in an action brought by the plaintiff under the statute, to recover double the amount of such valuation, &c., that such appraisement was void as against the defendant, although the statute does not, expressly, require notice thereof to be given to the defendant.

It *seems*, that land which has lain in a common field *de facto* for a series of years, cannot be excluded therefrom merely by an allotment made in pursuance of a vote of the proprietors of the general field.

It *seems* also, that under *St.* 1785, *c.* 52, the proprietors of a common field, in their corporate capacity, or as tenants in common, and not the individual proprietors holding portions of the common field in severalty, are liable, so far as regards the owner of lands adjoining the common field, to the duty of maintaining the partition fence between such portions of the common field and such adjoining land.

THIS was an action under *St.* 1785, *c.* 52, for the regulation of fences. From an agreed statement of facts it appeared, that the plaintiff was the owner of a tract of land in Hatfield, adjoining land of the defendant; that the land of the defendant was a part of a general field; that the "propriety" of this field was organized in 1769; that for more than forty years the plaintiff had supported one half of the fence, and individuals belonging to the propriety, the other half, under allotments by the propriety; that by an allotment made in June, 1831, in pursuance of a vote of the proprietors, the land of the defendant was excluded from the common field; that in June, 1831, the fence between the lands of the plaintiff and the defendant being in a ruinous state, the plaintiff requested the defendant to construct his part thereof; that the defendant having refused so to do, the plaintiff made application to the fence viewers, to view the fence and to direct the defendant to make his portion of it; that the fence viewers accordingly, after notice to the defendant, viewed the fence, made a division thereof, and directed the defendant to rebuild the part assigned to him, within six days; that the plaintiff built the part of the fence assigned to him, and, the defendant not having complied with the direction of the fence viewers, proceeded to rebuild

Digitized by Google

the defendant's part; that the fence viewers, afterwards, upon the application of the plaintiff, *but without notice to the defendant*, appraised the value of the defendant's part of the fence, and ascertained the amount of their fees; that the plaintiff thereupon requested the defendant to settle with him for making the fence, but he refused; that after the expiration of a month from the time of such request, this action was commenced under the provisions of the statute, to recover double the amount of the expenses of making the defendant's part of the fence, and of the fees of the fence viewers, together with interest thereon, at the rate of one per cent. per month.

Billings for the plaintiff. *Sept. 28th.*

Wells and *Alvord*, for the defendant, as to the point, that the proceedings of the fence viewers in appraising the expense of making the fence, &c., were void, inasmuch as no notice of the time and place where such proceedings were to be had, was given to the defendant, cited *The King* v. *Venables*, 2 Ld. Raym. 1405; *S. C.* Str. 630; *Chase* v. *Hathaway*, 14 Mass. R. 222; *Bouton* v. *Neilson*, 3 Johns. R. 467; *Rathbun* v. *Miller*, 6 Johns. R. 281; *Kinderhook* v. *Claw*, 15 Johns. R. 537; *Farmer* v. *Stewart*, 2 N. Hamp. R. 100; *Starr* v. *Scott*, 8 Connect. R. 483.

The opinion of the Court was afterwards drawn up by

Shaw C. J. The Court are strongly inclined to the opinion, that if the land of Dickinson the defendant, lay in the common field *de facto*, and had done so for a series of years, he taking the benefits and bearing the burdens of a proprietor in such common field, he could not be excluded by a vote of the proprietors; and then by force of the statute for regulating common fields, (*St.* 1835, *c.* 53,) the proprietors, in their corporate capacity, or as tenants in common, and not the individual freeholder, holding a parcel of such common field in severalty, were to be considered the adjoining proprietors against the plaintiff's land, liable to the duty of making and supporting the partition fence between the plaintiff and the common field. Any other construction would seem to subject the proprietors of lots, in a common field, to unequal burdens and conflicting duties.

But we have not decided the case upon this ground, because

Digitized by Google

Scott v. Dickinson.

we think there is another exception to the proceedings of the fence viewers, which is conclusive. The *St.* 1785, *c.* 52, § 2, directs, that where a proprietor, on notice, refuses to make his share of a partition fence, the party aggrieved may apply to two fence viewers, to divide the fence and fix the time within which it shall be made, and if the delinquent proprietor fails to make his share of the fence within the time ordered, the party aggrieved may make or repair it at his own expense. It then proceeds to enact, that when the same shall be completed and adjudged sufficient by two or more of the fence viewers, and the value thereof, together with the fence viewers' fees, ascertained in writing, the complainant shall have a right to receive double the amount, and if not paid in one calendar month, after demand, shall have an action therefor with interest at one per cent. per month on this double amount. It is found, in the present case, that such an adjudication was made, but it is found that no notice of the time and place of assessing this amount or valuation, was given to the defendant. The statute does not in terms require such a notice, but we think it does by reasonable and necessary implication. As a general rule and principle of justice, whenever persons are appointed to arbitrate and adjudicate upon the rights of others, some notice is to be given, to enable each party to state his claims and views, and adduce pertinent and proper proofs. And there seems to be a peculiar propriety in adhering to this rule, where the full amount of an actual indemnity is to be doubled by way of penalty. Where it is intended by the legislature, that referees, arbitrators, commissioners or other like bodies, appointed to pass judgment upon the rights of others, shall have power to proceed *ex parte*, such an intent should be manifested in express terms, or by necessary implication. It was suggested in argument, that this was analogous to the assessment of damages, after a default, which may be done without notice to the defendant. But the analogy does not hold. A defendant is summoned into court, as well to answer to the cause of action, as to the assessment of damages, and he has an opportunity to do so unless he voluntarily waives it. As no such notice was given, and no opportunity afforded to the defendant, to at

Digitized by Google

tend this assessment of the cost and expense of the fence, we think that he was not bound by it, and that this action cannot be maintained.

Scott v. Dickinson.

MARTIN TINKER *versus* The Inhabitants of RUSSELL.

In pursuance of authority from the legislature, a canal was located in such a manner as to include a county road, and was partly made, but afterwards, during a suspension of labor upon the canal, a surveyor of highways in the town in which the road lay, made the road passable, but not safe. It was *held*, that the road had been discontinued; and consequently, that the town was not responsible to a person injured by reason of its being out of repair.

THIS was an action on *St.* 1786, *c.* 81, § 7, to recover damages for an injury sustained by the plaintiff, in February, 1830, in consequence of a defect in a highway in the town of Russell.

At the trial, before *Putnam* J., the defendants proved, that in September, 1827, by virtue of *St.* 1822, *c.* 59, incorporating the Hampshire and Hampden Canal Company, a canal, and feeder for the same, were regularly located in such a manner as to include the whole of the road at the place where the injury was sustained by the plaintiff; and that under this location an excavation and an embankment had been made in 1827 and 1828, so as entirely to take up the road and obstruct all travel upon it. The road remained in this condition until 1829, when by work done, partly by the neighbours and partly by a surveyor of highways, (who acted without any authority from the town, except a general discretionary authority to repair the roads for the distance of two miles, of which two miles the part taken for the canal did not exceed twenty rods,) a road from seven to eight feet in width was made on the embankment and within the limits of the canal and feeder as located and worked, without any railing, and it was in this state when the accident complained of, happened. After 1828, no more work was done on the canal until 1832. By the act of incorporation, the company were allowed ten years from February 4, 1823, for the purpose of making the canal

Digitized by Google

Tinker v. Russell.

The defendants claimed that these facts furnished a sufficient defence to the action, but the judge ruled against them, intending to reserve the question, and a verdict was returned for the plaintiff.

Dewey, for the defendants.

I. C. Bates, *Knox* and *Hamilton* for the plaintiff.

Sept. 28th, 1832.

Per Curiam. We cannot entertain a doubt that the road was discontinued at the place in question, by the laying out of the canal, and that the defendants were of course exonerated from the duty of keeping the road in repair. By the act incorporating the canal company, § 7, any person, who, contrary to law, in any way injures the canal, or any part of it, is made liable for treble damages and also to indictment. It is objected, that during the suspension of the work on the canal, the surveyor of highways of the town of Russell made repairs on the road, whereby it was rendered passable; but after it had been discontinued by the authority of the legislature, neither the surveyor nor the town had power to reëstablish it.

Plaintiff nonsuit

Roswell Leonard, by his Guardian, *versus* Joseph Leonard.

Where a person *non compos mentis* under guardianship, had in his possession a promissory note payable to himself, and received payment of it from the promisor, who had knowledge of the guardianship, it was *held* that such payment was of no effect; and the letter of guardianship was *held* to be conclusive evidence, that at the time of the payment the ward was not of sound mind.

Assumpsit to recover the amount of a promissory note, dated May 12, 1830, made by the defendant, payable to the plaintiff or order, for $169·34. Trial before *Morton* J., upon the general issue

It appeared that the plaintiff and the defendant were inhabitants of West Springfield, at the time when the note was given; that the defendant still continued to be an inhabitant of that town; that on May 12 and 19, 1830, the plaintiff took deeds of certain land in Suffield, in Connecticut; that he was

Digitized by Google

regularly put under guardianship by the court of probate, as a person *non compos mentis*, on June 1, 1830; at which time he had his domicile in West Springfield; that he owned real estate in that town; that he was unmarried; and that since he had been put under guardianship, he had boarded in Suffield in the summer, working upon his land there, and in West Springfield in the winter.

The defendant offered to prove that the plaintiff was not *non compos mentis*, but that he was before and at the time when the guardian was appointed, and had been ever since, of sound mind and capable of managing his own concerns. But the judge rejected the evidence, and ruled that the decree of the court of probate was conclusive.

It further appeared, that in May, 1831, the defendant paid to the plaintiff, in Suffield, the amount of this note and took it up, the same being then in the possession of the plaintiff. The defendant contended, that he had a legal right to pay the note to the ward, it being then in his possession and he residing in Suffield in the State of Connecticut. The residence of the defendant and the former residence of the ward were only four or five miles from the land purchased by the ward in Suffield. The defendant, at the time of the payment, resided in this State, and knew of the existence of the guardianship, and that the guardian resided in the same town with himself. The jury were instructed, that, under these circumstances, the delivery of the money to the ward did not amount to a payment of the note.

A verdict was found for the plaintiff. But if the foregoing instruction was wrong, or if the evidence rejected ought to have been received, a new trial was to be granted; otherwise judgment was to be rendered on the verdict.

Mills and *Boies* for the defendant. By the fair construction of *St.* 1783, *c.* 38, letters of guardianship cease to operate so soon as the disability of the ward ceases. According to the judge's report, the defendant offered to prove that the plaintiff had always been of sound mind. This position was undoubtedly too broad; the important point was, that the plaintiff was of sound mind at the time when the money was paid to him; and evidence of this fact should have been admitted. The

Sept. 26th, 1832

Digitized by Google

Leonard v. Leonard

decree of the judge of probate was *primâ facie* evidence that the plaintiff was *non compos*, not conclusive evidence. 12 Petersdorff's Abr. 395; *Hall* v. *Warren*, 9 Ves. 605; *Ex parte Barnsley*, 3 Atk. 168; Bac. Abr. *Idiots &c.*, *B*; *M'Donald* v. *Morton*, 1 Mass. R. 546; *White* v. *Palmer*, 4 Mass. R. 147; *Stone* v. *Damon*, 12 Mass. R. 488; 1 Stark. Evid. 258, 259.

But admitting that the letters of guardianship were conclusive evidence that the plaintiff was not of sane mind, yet as the note was made payable to the plaintiff and was entrusted to him by the guardian, he is to be regarded as the agent of the guardian and payment to him was payment to the guardian. 3 Stark. Evid. 1086. The guardian himself could not have received payment, not having the note in his own possession.

Whatever was the state of the ward's mind, he was compe tent to receive money, because that was for his benefit; since a person *non compos* under guardianship, is liable to be arrested and imprisoned for debts contracted by him before a guardian was appointed. Bac. Abr. *Idiots &c.*, *F*, *Maddon* v. *White*, 2 T. R. 159; *Oliver* v. *Houdlet*, 13 Mass. R. 237, 240; *Thacher* v. *Dinsmore*, 5 Mass. R. 299; *Ex parte Leighton*, 14 Mass. R. 207. If the defendant shall be compelled to pay the guardian, he will have a right of action against the ward to recover back the money paid to the ward; so that a judgment against the defendant will merely lead to circuity of action.

Lathrop, for the plaintiff, insisted that the letter of guardianship, so long as it remained unrevoked and not annulled, was conclusive evidence of the plaintiff's being *non compos mentis*. 1 Stark. Evid. 227, 231; *Allen* v. *Dundas*, 3 T. R. 125; *Sumner* v. *Parker*, 7 Mass. R. 79; *Smith* v. *Rice*, 11 Mass. R. 507.

It is questionable whether the guardian of a *non compos* can appoint the ward his agent to receive money, but in the present case the only evidence of such agency is the possession of the note by the ward; but the inference which would in other cases arise from that circumstance, is repelled by the facts that he was *non compos mentis* and under guardianship

Digitized by Google

Payment to the ward therefore was ineffectual. Nor can the defendant complain of any hardship, for he knew of the appointment of the guardian, and payment to the guardian would have been a defence to an action by the ward, as well in Connecticut as in this State.

Sept. 28th, 1833.

Per Curiam. The defence in this case is put upon two grounds; 1. that the ward was of sound mind; and 2. that in receiving payment of the note he was acting as the agent of the guardian.

In order to support the first ground, the defendant offered evidence that the plaintiff was of sufficient capacity to transact business. This was not received, and the question is, whether it was properly excluded; in other words, whether the decree of the probate court was conclusive evidence that the plaintiff was not of sound mind. In general, the judgment of a court of competent jurisdiction is conclusive against the parties; and judgments *in rem* are conclusive against all the world; for instance, decrees in admiralty cases, and in relation to marriage and divorce, the probate of wills, &c. The question, then, is, whether the appointment of a guardian is of this nature. It is suggested on the part of the defendant, that an inquisition of lunacy in England, is not conclusive on the question of sanity; but it is a sufficient answer, that such an inquisition is very different from the proceedings in a court of probate under our statute. The plaintiff insists, that the guardianship is conclusive of the disability of the ward, in relation to all subjects on which the guardian can act, and that the only mode of preventing this operation is by procuring the guardianship to be set aside. And there can be no question but that the judge of probate has power to reconsider the subject, and if it shall appear that the cause for the appointment of a guardian has ceased, or that the guardian is an improper person for the office, the letter of guardianship may be revoked. *M'Donald* v. *Morton*, 1 Mass. R. 543. In the case of *White* v. *Palmer*, 4 Mass. R. 147, it was held that the letter of guardianship was competent evidence of the insanity of the ward, and the reasoning tends to show that it is conclusive; but this was not the question then before the Court. If this

Digitized by Google

Leonard v. Leonard.

were not the general principle of the law, the situation o. the guardian would be extremely unpleasant, and it would be almost impossible to execute the trust. In every action he might be obliged to go before the jury upon the question of sanity, and one jury might find one way, and another another. We are of opinion, that as to most subjects, the decree of the probate court, so long as the guardianship continues, is conclusive evidence of the disability of the ward; but that it is not conclusive in regard to all. For example, the ward, if in fact of sufficient capacity, may make a will, for this is an act which the guardian cannot do for him. But the transaction now in question falls within the general rule.

The remaining question is, whether the ward received the money as the agent of the guardian. The only evidence tending to prove this is the fact that the ward had possession of the note; and under all the circumstances of the case, the defendant had no reason to believe that the guardian had appointed the ward his agent.

Judgment according to verdict

Digitized by Google

NATHANIEL CHANDLER *et al. versus* ALMON BRAINARD.

Where a note made by fourteen promisors was taken up by four of them, who gave in satisfaction thereof their own joint and several negotiable note, it was *held* that this was such a payment as would enable the four to maintain an action for contribution against a co-promisor in the first note.

The new note having been received on the joint credit of the four, it was *held* that they ought to join in an action for contribution.

Where a deposition was taken by a justice of the peace who was the son-in-law of one of the parties in the action, but no fraud or partiality was alleged, it was *held* that the justice was not "interested in the event of the cause," within the meaning of *St.* 1797, *c.* 35, § 1, and that the deposition might be admitted in evidence.

The facts, that several persons associated together to run a line of stagecoaches, that they had a general meeting, and that debts were contracted on account of the company, do not prove a partnership as between themselves.

ASSUMPSIT. Trial before *Shaw* C. J. It appeared that fourteen persons, of whom Helaz Alvord, the defendant's intestate was one, gave their joint and several note, dated January 3, 1827, for $3000, payable to William Clark or order, in one year, and that it was indorsed by Clark. Chandler negotiated it on account of Clark, to Mary Belknap, who advanced the money for it. The plaintiffs, being four of the promisors, took up the note, under the circumstances hereafter stated, and brought this action for a contribution.

To prove payment by themselves the plaintiffs produced the deposition of Mary Belknap; which was objected to, on the ground that the magistrate who took it was not a disinterested and indifferent person, he being a son-in-law of one of the plaintiffs. The deposition was admitted *de bene esse*, for the purpose of reserving this objection.

By this deposition it appeared, that after the note became due, a new note, dated January 23, 1828, made by the four plaintiffs jointly and severally, for the like sum of $3000, payable to Mary Belknap or order, was received and accepted by her in full satisfaction of the first note; and that the note last made was still outstanding and unpaid.

It further appeared, that the signers of the first note, together with other persons, constituting a stagecoach company, met at Petersham at the time of its date; that Clark stated

Digitized by Google

Chandler v. Brainard.

to them, that the company was considerably in debt; and that it was proposed to make a note to raise some money. Clark stated that $3000 would be sufficient to pay those creditors who did not belong to the company, and the note was made for the purpose of raising money to pay them. There were some members of the company present who refused to sign the note. The proceeds of it were paid to various creditors of the company, but no part was paid to either of the plaintiffs.

On these facts judgment was to be rendered on nonsuit or default, or a new trial was to be granted, as the Court should direct.

Sept. 28th, 1832.

A Brooks, for the plaintiffs, cited to show that giving the second note was a payment of the first, *Barclay* v. *Gooch*, 2 Esp. R. 571; *Witherby* v. *Mann*, 11 Johns. R. 518; *Cornwall* v. *Gould*, 4 Pick. 444; that it was proper for the plaintiffs to bring a joint action, *Graham* v. *Robertson*, 2 T. R. 282; *Osborne* v. *Harper*, 5 East, 225; *Hill* v. *Tucker*, 1 Taunt. 7; that the deposition was admissible in evidence, *St.* 1797, *c.* 35, § 1; and that the members of the stagecoach company were not partners, and if they were, that the giving of these notes were not partnership transactions, 3 Stark. Evid (Metcalf's edit.) 1083; *Van Ness* v. *Forrest*, 8 Cranch, 30 *Hesketh* v. *Blanchard*, 4 East, 144; *Smith* v. *Barrow*, 2 T R. 476.

Wells and *Grennell*, for the defendant, said that an action for contribution depends not on contract, but on equity; *Deering* v. *Winchelsea*, 2 Bos. & Pul. 270, and 1 Cox's Eq. R. 323; that although the giving of the second note was, for some purposes, a payment of the first, it was not such a payment as would entitle the plaintiffs to contribution; *Maxwell* v *Jameson*, 2 Barn. & Ald. 161; 13 Petersdorff's Abr. 775, 776; that the note in suit being several as well as joint, each of the plaintiffs assumed to pay one-fourth part of it out of his own funds, and therefore, if giving this note was a payment, each ought to sue separately; that the stagecoach company, being an association to effect a common object for their mutual benefit and to pay their common debts, was a copartnership, and the facts in the case did not prove any equity in favor of

Digitized by Google

the plaintiffs, for members who did not join in the note, may have paid other debts; *Campbell* v. *Mesier*, 4 Johns. Ch. R. 334; *Craythorne* v. *Swinburne*, 14 Ves. 160; that one partner cannot maintain assumpsit against a copartner, unless a balance has been struck on a settlement of the partnership concerns, or unless the action itself will effect a settlement; and that the deposition ought not to have been admitted, because the magistrate was not disinterested; Declaration of Rights, *art.* 29; *Peacock's case*, 9 Co. 70; *Shaw* v. *Lindsey*, 15 Ves. 380; *Smith* v. *Smith*, 2 Greenl. 408; *Bean* v. *Quimby*, 5 N. Hamp. R. 94; *Bellows* v. *Pearson*, 19 Johns. R. 172; *Tweedy* v. *Picket*, 1 Day, 109.

Sept. 29th, 1832.

Per Curiam. The defendant objects that the giving of the note in suit was not such a payment of the first note as will enable the plaintiffs to maintain an action for contribution. The general rule in this commonwealth is, that the taking of a negotiable note for a debt, is a payment; and here it appears that the second note was received in full satisfaction of the previous note. The case of *Cornwall* v. *Gould*, 4 Pick. 444, is decisive on this point, against the defendant.

It is further objected, that the plaintiffs ought to have brought several actions. The general principle is, that where there is a joint interest in the plaintiffs, the action should be joint. Here the second note was joint and several, but it was received on the joint credit of the four plaintiffs; and the case cannot be distinguished from that of *Osborne* v. *Harper*, 5 East, 225. This objection therefore is not sustained.

Another objection, and which deserves more consideration, is the one relating to the deposition. It appears that the magistrate by whom the deposition was taken, was the son-in-law of one of the plaintiffs; and it is contended on behalf of the defendant, that one who is related to a party by consanguinity or affinity, is disqualified to act in such a case. On the one side it is said, that the act of the magistrate, in taking a deposition, is of a judicial character; on the other, that it is ministerial However this may be, it is certain that he exercises a great deal of discretion, particularly where the witness is illiterate and uninformed. Cases were cited to show that a person thus related to one of the parties cannot

Digitized by Google

Chandler v. Brainard.

sit as a judge in the trial of the cause; but we think the question before us depends on our statute of 1797, c. 35, § 1, relating to depositions. The provision in this statute is, that a deposition "may be taken before any justice of the peace, not being of counsel or attorney to either party, or interested in the event of the cause." Here the magistrate was not of counsel nor attorney to either party; and the question is, whether he was interested in the event of the cause. These words have a well settled meaning in the law; they refer to such an interest as would disqualify a person to be a witness. We cannot presume that they were used in a different sense in this statute; and when the legislature have said that a magistrate not thus disqualified may take a deposition, we cannot decide that he shall not exercise such power. The Court however have a discretion, in some respects, in regard to the admission of testimony, and if it were shown that fraud or partiality had been practised in taking a deposition, they would reject it. The relationship of the magistrate to one of the parties, would have some tendency to show partiality; and much would depend on the nature of the testimony itself. The deposition under consideration details but a few facts, and the statement of the witness is corroborated by written evidence; and although in general it is reprehensible in a magistrate, to take testimony in a cause, where he is nearly related to one of the parties, still we are of opinion that this deposition ought not to have been rejected. [See *Wood* v. *Cole*, 13 Pick. 279; *Coffin* v. *Jones*, 13 Pick. 441.]

We perceive no facts in the case tending to show a partnership, except that a number of persons formed an association to run a line of stagecoaches, that they had a general meeting, and that debts were contracted on their account; but we think this is not sufficient evidence to prove a partnership. *Clark* v. *Reed*, 11 Pick. 450.

With respect to the damages, the plaintiffs are entitled to judgment against the defendant for one fourteenth part of the amount of the note which has been paid.

Defendant defaulted.

Digitized by Google

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF WORCESTER, OCTOBER TERM 1833, AT WORCESTER.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE,
HON. SAMUEL PUTNAM,
HON. SAMUEL S. WILDE, } JUSTICES.
HON. MARCUS MORTON,

EDMUND COBB *versus* CHENERY ABBOT and JOSEPH TAYLOR.

A line of stagecoaches was run by the two defendants from Barre through Holden to Worcester and back, and it was agreed that one of them should furnish and maintain horses and coaches and receive the money paid for the transportation of passengers between Holden and Worcester, and that the other should do the like between Holden and Barre. They hired a man to drive all the way from Barre to Worcester and back, for a certain sum per month and perquisites; and money was delivered by the plaintiff to this driver to carry from Barre to Worcester, but he absconded without delivering it. *Held*, that the driver was the servant of the defendants jointly, and that they were jointly liable to the plaintiff for the money.

THIS action was brought to recover a sum of money delivered by the plaintiff to a stagecoach driver, named Haynes, who drove a stagecoach from Barre through Holden to Worcester, and back on the same road from Worcester to Barre. The defendants are charged in the writ as copartners and joint

Digitized by Google

Cobb v. Abbot.

proprietors of the coach driven by Haynes, who is called their servant. The general issue was pleaded.

It appeared that in June, 1830, Abbot alone advertised that he was about to commence the running of a stagecoach from Worcester to Barre and back, by the road above mentioned. The reason assigned by the defendants, why Abbot published the advertisement in his own name only and exhibited himself as the sole proprietor, was, that Taylor was interested with other persons in a stagecoach passing from Holden to Boston but not passing through Worcester, and he did not wish to have it known that he was concerned in another line of coaches running between Holden and Boston.

The agreement between Abbot and Taylor was, that Abbot should furnish, maintain and own the horses and coaches used between Holden and Worcester, receive to his own use all the money paid for the transportation of passengers between Holden and Worcester, which being about half as far as from Holden to Barre, the fare was to be half as much as should be paid for a passage between Holden and Barre; and that Taylor should furnish, maintain and own the horses and coaches used between Holden and Barre, and receive the money paid for all passengers between these two towns; and they did so own and maintain their horses and coaches. They hired Haynes to drive all the way from Worcester to Barre and back, at ten dollars a month, and Haynes was to have "the perquisites," as expressed by the witness, without any explanation. Abbot's coach passed every day in the week, except Sunday, from Holden to Worcester and back; but Taylor's passed from Holden to Barre and back but three times in a week. Abbot was to pay one half of Haynes's wages, and Taylor the other half. The money paid by passengers was received at Abbot's tavern, in Holden, and a book was kept by his bar-keeper, in which an account was kept, in one page, of the money paid by passengers for Abbot, for his end of the line, and in another page, of the receipts for Taylor, from passengers, for his end of the line. In this book, which was the only way-book kept by either of the defendants, there was no entry of any receipt for any baggage or package sent, and there was no evidence of any receipt by either of the defend

Digitized by Google

ants, of any payment for baggage at any time. It was admitted that the money in question was delivered by the plaintiff to Haynes at Barre, to be delivered at Worcester, and that Haynes absconded without delivering it.

The question was submitted to the jury, whether the defendants had proved that the contract was made particularly with Haynes, and that the plaintiff intended, when he sent the money, to exonerate the owners of the coach, whoever they might be, from liability.

The jury returned a verdict for the plaintiff. If the evidence established such a copartnership between the defendants as would enable the plaintiff to maintain the action, judgment was to be entered on the verdict; otherwise a new trial was to be granted.

Oct. 4th, 1832.

Hoar and *Towne*, for the defendants, insisted that the facts did not prove a partnership. There was no sharing of profits or losses, but each defendant was to receive the profits and sustain the losses on his own horses and coaches. Gow on Partn. 1. [*Shaw* C. J. Does the case raise the question of partnership, strictly speaking? The question seems rather to be, whether the driver was the servant of the two defendants jointly.] If there was an agency making the defendants jointly liable, it must be on the ground of a partnership. But one of the defendants had no control of the driver, when he was on the part of the route belonging to the other. The difficulty of showing whether the money was lost between Holden and Barre or between Holden and Worcester, will not enable the plaintiff to join both of the stagecoach proprietors in an action; it is only a difficulty arising from want of evidence. Gow on Partn. 1; *Barton* v. *Hanson*, 2 Taunt. 49; *Thorndike* v. *De Wolf*, 6 Pick. 120; *Allen* v. *Sewall*, 2 Wendell, 327; *In the matter of Webb et al.* 8 Taunt. 443.

Merrick and *Houghton*, for the plaintiff, cited Gow on Partn. 6; 3 Kent's Comm. 1 *et seq.*; *Waland* v. *Elkins*, 1 Stark. R. 272.

Oct. 8th, 1832.

Per Curiam. The only question for consideration is, whether the facts show that both of the defendants are liable for the acts of Haynes, or whether he was the agent sometimes of one and sometimes of the other, according to the

Digitized by Google

Cobb v. Abbot

part of the route on which, at different times, he was driving. They employed him jointly, and gave him perquisites; and he would be allowed to sue them together for his wages. He was the servant of both to some purposes. But we shall not decide the case on this narrow ground; for he might be employed by the defendants jointly and have a joint claim against them, and yet be in the several employment of one or the other at different times.

What then was the nature of this contract with the plaintiff? Was it to carry the money from Barre to Holden and from Holden to Worcester, or to carry it from Barre to Worcester? Was it one or two contracts? If the driver was the servant of one of the defendants at one end of the line, and of the other at the other, there were two contracts; and this brings us to the general question, whether the defendants were so connected as to be jointly liable for his acts. It is not easy to decide, whether they were interested in the whole line, or each at one end only. It should seem in the outset, that there was but one enterprise, namely, to run a line of stagecoaches from Barre to Worcester and back. The contract between the defendants was not a stipulation that one would run coaches one part of the way, if the other would, the other part; but it seems to have been a joint undertaking, and the advertisement was of a stagecoach running from Worcester to Barre and back. Each of the defendants was at the expense of supporting the line at one end of the route; and if the arrangement had been to divide the profits equally or proportionably, there would have been a partnership, beyond any doubt. Does it make a difference that they divided the profits according as they were earned at each end? The question is not without difficulty, but on the whole, we think they must be considered so far jointly concerned, as to be jointly liable for this driver's act in this particular instance. They jointly hired him, and for a joint object; and the well managing of the business at one end of the line, was of importance to the other.

Judgment on the verdict

Digitized by Google

DAVID RICE, Administrator of John West, *versus* EZRA GODDARD.

In an action on a promissory note given for the purchase-money of land conveyed by deed with covenants of seisin and warranty, the action being between the original parties, it is competent for the defendant to prove, by way of defence, a total failure of title to the land.

Where the note was assigned by the payee after it had become due, and the maker expressly promised the assignee to pay it, and afterwards the title to the land entirely failed, it was *held* that the assignee could not enforce payment of the note against the maker.

ASSUMPSIT on a promissory note made under the following circumstances. One Whitney was in possession of a tract of land, situate in Worcester, claiming to own it. About the date of the note, West, being the attorney of Whitney, sold the land to one Pond. A deed was made and executed by Whitney and his wife, and it was agreed that Whitney and West should come to Worcester at a particular time and deliver it. In the mean time Pond bargained with the defendant for the land, and when West and Whitney came to deliver the deed, Goddard and Pond were present, and it was delivered to Pond, and a part of the purchase money was paid by Goddard, and for the balance Goddard gave the note now in suit. This note, dated October 10, 1828, and payable in one year, was made to West as agent of Whitney, and it was agreed between West and Whitney, that West should hold it for the benefit of Whitney, and pay over to him the money which might be paid upon it. The fact that Pond had bargained with Goddard for the land, was known to West and Whitney, and some conversation was had about the deed from Whitney being made directly to Goddard, but as the deed to Pond had already been signed by Whitney's wife, it was thought best that it should be delivered to Pond, and that Pond should make his deed to Goddard. This was accordingly done. Both deeds contained the usual covenants of seisin and warranty.

On November 7, 1829, the note was assigned, for a valuable consideration, to one Coolidge, to whom Goddard made one or more payments upon it, and promised to pay the balance.

The balance of the note was not paid, because it was dis-

Digitized by Google

Rice v. Goddard.

covered that the title to the estate was not in Whitney, when he conveyed it; and Goddard was ousted from the possession of the land, and he has ever since refused to pay the note.

An action has been commenced by Goddard against Whitney, upon the covenants in his deed, and Whitney was defaulted at the first term, and the action has been continued from term to term to save the attachment made in the same suit, and no judgment has been rendered thereon.

Oct. 4th, 1832.

Merrick and *Kinnicutt* for the plaintiff. The covenants in Whitney's deed constitute a valid and sufficient consideration for the note. *Knapp* v. *Lee*, 3 Pick. 452; *Fowler* v. *Shearer*, 7 Mass. R. 19; *Phelps* v. *Decker*, 10 Mass. R. 279; 1 Dane's Abr. 125, cites *Little* v. *Roberts*; *Lloyd* v. *Jewell*, 1 Greenl. 352. The covenants were independent of the promise in the note, and one independent covenant or promise is a good consideration for another. 1 Wms's Saund. 320, note 4. The covenants were certainly a part of the consideration for the note, and where there are two considerations and one fails or is void, and the other is good, and the proportions of them cannot be liquidated, the promise will be intended to have been given wholly for the good consideration. Com. Dig. *Action on the case in assumpsit*, *B* 13; *Bradburne* v. *Bradburne*, Cro. Eliz. 149; *Coulston* v. *Carr*, Cro. Eliz. 847; *Bliss* v. *Negus*, 8 Mass. R. 51; *Campbell* v. *Jones*, 6 T. R. 572. [But see *ante*, *Parish* v. *Stone*, 198, 207.] By bringing the action against Whitney on the covenants, Goddard has elected to consider the note as in force. *Kimball* v. *Cunningham*, 4 Mass. R. 502; *Hunt* v. *Silk*, 5 East, 448; *Curtis* v. *Hannay*, 3 Esp. R. 83; *Ketletas* v. *Fleet*, 7 Johns. R. 324. The note was the promise of Goddard to pay the debt of another, the debt being due from Pond to Whitney, and the want or failure of consideration between Pond and Goddard is no defence to the action. 4 Petersdorff's Abr. 229; Bayley on Bills, (Phil. and Sewal's 1st edit.) 350, and notes; *Nickerson* v. *Howard*, 19 Johns. R. 113; *Sanger* v. *Cleveland*, 10 Mass. R. 415; *Parsons* v. *Adm'rs.* of *Gaylord*, 3 Johns. R. 463. But the consideration between Goddard and Pond has not failed entirely, for Goddard has Pond's covenants, which he may enforce. It

Digitized by Google

will be said that Coolidge took the note subject to all claims of set-off by Goddard against Whitney; but by a payment to Coolidge of part of the note, and an express promise to pay him the balance, Goddard has waived this defence; *Fenner* v. *Meares*, 2 W. Bl. 1269; *Crocker* v. *Whitney*, 10 Mass. R. 316, *Tudor* v. *Whiting*, 12 Mass. R. 218; and this waiver also estops him, as against Coolidge, to show that there was a total failure of the consideration. He has thus led Coolidge to neglect taking measures which might once have been effectual, to obtain a repayment of the consideration which passed from Coolidge to Whitney.

The difference in the amount of damages on the covenant and on the note, and the inconvenience of trying a title to land in an action of assumpsit, are considered in *Lloyd* v. *Jewell*, 1 Greenl. 352.

J. Davis and *Washburn*, for the defendant, said that the express promise made to Coolidge was not binding, being made under a mistake of fact, it being then supposed that the defendant had a valid title to the land.

To the point that there was a failure of the consideration of the note, they cited Bayley on Bills, (Phil. and Sewall's 1st edit.) 345; *Reed* v. *Prentiss*, 1 N. Hamp. R. 176; *Shepherd* v. *Temple*, 3 N. Hamp. R. 458; *Knapp* v. *Lee*, 3 Pick. 452; *Greenleaf* v. *Cook*, 2 Wheat. 16; *Frisbee* v. *Hoffnagle*, 11 Johns. R. 50; 3 Stark. Evid. 280, note; *Sargent* v. *Southgate*, 5 Pick. 320; *Evans* v. *Prosser*, 3 T. R. 186.

Per Curiam. This action is brought on a promissory note, for the benefit of an assignee, but it is subject to the same defence as if prosecuted for the benefit of the promisee. The note was given in consideration of the conveyance of land by deed with the usual covenants of seisin and warranty. The title to the land failed entirely; and the question is, whether that want of title is an entire want of consideration for the note, so as to render it *nudum pactum*, or whether the covenants were of themselves a sufficient consideration to support the promise. It was decided by the court in Maine, in *Lloyd* v. *Jewell*, 1 Greenl. 360, that the covenants were a sufficient consideration. The decisions of that court are entitled to great respect; the opinion however in the case cited was

Digitized by Google

Rice v. Goddard.

grounded on what was considered to be the settled law of Massachusetts; but though there have been dictums, (*Fowler* v. *Shearer*, 7 Mass. R. 19; *Phelps* v. *Decker*, 10 Mass. R. 279;) there has been no decision in this State, to that effect, and so the foundation of the opinion fails. The same subject has been before the courts of other States, and the decisions have uniformly been, that a total failure of title is a tota failure of the consideration. *Frisbee* v. *Hoffnagle*, 11 Johns. R. 50; *M'Allister* v. *Reab*, 4 Wendell, 483; *Steinhauer* v. *Witman*, 1 Serg. & Rawle, 447; *Gray* v. *Handkinson*, 1 Bay, 278; *Bell* v. *Huggins*, 1 Bay, 327; *Chandler* v. *Marsh*, 3 Vermont R. 162; *Tillotson* v. *Grapes*, 4 N. Hamp. R. 448. The promise is not made for a promise, but for the land; the moving cause is the estate; and if that fails to pass, the promise is a mere *nudum pactum*. It was objected that the rule of damages in an action on the covenant would be different from the consideration of the promise; but in the case of a total failure of title, the amount of damages would be the same; and it is just that a party should be allowed to show a total failure, in an action on the promise, instead of being compelled to seek his remedy on the covenants. [See *Dickinson* v. *Hall*, *ante*, *p*. 217.]

Plaintiff nonsuit

Digitized by Google

The First Parish in Shrewsbury *versus* Daniel Smith.

By a vote of the proprietors of a township, a lot of land was appropriated for the purpose of erecting a meeting-house thereon. In 1727, after the erection of the meeting-house on the land, the town was incorporated and assumed the charge of its parochial affairs. The land around the meeting-house, was called "the common" or the "meeting-house land," was always open, and was intersected by several highways and other ways; it was also used as a site for horse-sheds and for all the ordinary purposes incident to a place of worship, and as a training-field. The town meetings had been held at the meeting-house. In 1754 and 1763, the proprietors voted to sell portions of the "meeting-house land," and they had also at different times exercised other acts of ownership over portions of this land. It was *held*, that the first parish, which was the successor of the town in its parochial capacity, might maintain trespass against a stranger who had ploughed up a portion of the land, which was used for purposes incidental to a place of worship.

It seems, that the vote of the proprietors, and the actual erection of the meeting-house, gave an actual possession of the land to the parish, which was sufficient to enable them to maintain trespass against a stranger.

This was trespass *quare clausum*, for ploughing up a large part of the land, called "the common," in Shrewsbury, on which the plaintiffs' meeting-house stands. The defendant claimed to have entered under a right in him, as a proprietor, to lay out the land.

The parties stated a case.

On November 2, 1717, the general court, on the petition of John Brigham and thirty others, granted the township of Shrewsbury, to be laid out as a town, and appointed a committee, with power "to grant and lay out the whole of the lands to such persons as they, in their wisdom, should think most likely to advance the settlement of the place," "provided they [the committee] have there at least forty families settled there, with an orthodox minister, within the space of three years, and that a lot and other accommodations as large and convenient as may be the place will admit of, in the judgment of the committee, be laid out to the first settled minister, also a lot for the ministry, and another for the use of the school." The committee proceeded to execute the duties assigned to them, and drew up their regulations, in which they declare, that, "pursuant to the power and the directions to them given in and by said order of the general court, having

Digitized by Google

First Par. in Shrewsbury v. Smith.

due regard to the savings and exceptions therein made, they have granted to the several petitioners and farmers, whose names are under-written, and their heirs for ever, the several house lots," &c.

On October 27, 1719, the proprietors voted, "that the place for the meeting-house be on Rocky plain near the pines," and "if the said spot could not be obtained on reasonable terms, that then the meeting-house be set on Meeting-house hill." On May 20, 1721, the proprietors granted to William Taylor five acres and twenty-four rods of land, which is described in the records of the proprietors. Subjoined to this description is the following statement: "This abovementioned land was granted to the said William Taylor for satisfaction for fifteen acres of land, which he the said William Taylor has aliened to the proprietors of Shrewsbury, for to build a meeting-house upon." Taylor, in his deed to the proprietors of Shrewsbury, of fifteen acres of land called Rocky plain, "reserves to himself, his heirs, &c., an equal privilege in the aforesaid fifteen acres of land, with any one single proprietor."

On April 13, 1720, the society, at a meeting under a warrant for a "proprietors' meeting," voted, "that a committee of five men be chosen to manage about the meeting-house." On June 20, 1720, at an adjournment of the previous meeting, it was voted, that the propriety was willing to go forward with their meeting-house as fast as they could from that time; that the sum of £210 be levied upon the proprietors of the house lots in the town called Shrewsbury, for the purpose of building the meeting-house, and that the committee previously chosen, be empowered to contract for the building of the meeting-house, and to procure the land for the same. On May 15, 1723, the following entry is made in the records: "The Reverend Job Cushing was chosen by said town, for their minister, by a full vote."

On the 14th of December, 1727, the town was incorporated, and on the 29th was organized in its municipal character, when it took charge of the affairs of the society, making all grants of money for preaching, and for the repairing and finishing of the meeting-house, and continued to do so until 1743, when a second parish was incorporated in the territory

Digitized by Google

now called Boylston. The society before mentioned thereupon became the first parish, and was then organized as a precinct. In 1786, the second parish was incorporated as a town by the name of Boylston; and thereupon, the parochial affairs of the first parish again fell into the hands of the town of Shrewsbury, the parochial organization being discontinued, and were managed by the town until 1821, when the precinct was again organized, and has so continued ever since.

In pursuance of the votes of the proprietors in 1720, a meeting-house was erected on the tract of fifteen acres, in which the society worshipped until 1766, when they erected a new meeting-house, on the same tract of land, between the old one and the principal highway leading through Shrewsbury. The old meeting-house was then taken down by the society and appropriated to their use, and they have ever since continued to worship in the new meeting-house. The land around the meeting-houses, which has always been open and unfenced, is intersected by several ways leading to the burying-ground, &c., and by two highways, and is known by the name of the common, or the meeting-house land. The society have always used this open space for sites for horse-sheds, and for all the ordinary purposes incident to a place of worship. The town meetings and other public meetings have been generally held at the meeting-house, and the open space has been used as a training-field.

The burying-ground is on the same tract, in relation to which the town from 1730 to 1738, passed votes, providing for clearing the land and fencing it. In 1743, the society, being organized as a parish, appeared, by their records, to have taken charge of the burying-ground, and from that time until 1786, numerous votes were passed by them, providing for repairing the fence, clearing away the brush, &c.

In 1754 and 1763, the proprietors voted to let certain persons have portions of the "meeting-house land." In 1766, they voted to choose a committee to look up the bounds of the meeting-house land, and to report how much thereof it was proper to sell; and the committee reported that it was proper to sell several portions of it.

In 1773, the proprietors voted to give the first precinct,

Digitized by Google

First Par. in Shrewsbury v. Smith.

liberty to move out the wall of the burying-ground. In 1790, the two following articles were inserted in the warrant for a proprietors' meeting; 1. To see if they would appropriate six rods in width, of land in front of the burying-yard, to enlarge it; 2. To see if they would give the town liberty to cut the brush which grew around the yard. At the meeting the proprietors voted to allow the inhabitants of the town of Shrewsbury to clear up the brush, &c., at the west end of the burying-ground, as far as the west line, and also the birches and poplars on the north side. No other vote was passed on the subject. In May 1795, they "voted to sell the wood on the proprietors' land near the burying-ground," and chose Jonathan Bush, Job Cushing and Joab Hapgood, a committee for this purpose. Two of this committee were members of the parish, and the land was sold to another member. In 1791, the proprietors granted to the town of Shrewsbury two acres and ninety-six rods of the meeting-house land, for a burying-ground; this included the old burying-ground.

In 1802, the town voted to accept the plan of the burying-ground, as laid out and exhibited by the committee on that subject. The article in the warrant for the meeting, under which this vote was passed, was as follows; "To see if the town are disposed to lay out that ground which was last appropriated for a burying-place, into such squares or plots as shall be thought best calculated to accommodate individuals and make a saving of the same in future."

The site of the old meeting-house and the ways leading to the new meeting-house, the sheds and the burying-ground, were ploughed up by the defendant.

Oct. 8th 1832.

Davis and *Washburn* for the plaintiffs.

Newton and *Lincoln*, for the defendant, cited to the point, that if the parish entered into possession by license from the proprietors, they had acquired no right to it, *Commonwealth* v. *Dudley*, 10 Mass. R. 403; *Porter* v. *Hill*, 9 Mass. R. 34; that a corporation cannot acquire a title by a disseisin committed by itself, *Weston* v. *Hunt*, 2 Mass. R. 502; Com Dig. *Seisin*, F 4; and that a concurrent possession of the parish cannot be considered an ouster of the proprietors. *Norcross* v. *Widgery*, 2 Mass. R. 506.

Digitized by Google

SHAW C. J. delivered the opinion of the Court. There is great difficulty in applying the strict rules of common law conveyancing, to the early acts and votes of proprietors, towns and parishes, in the colony and province of Massachusetts, without danger of producing some confusion of rights; and the fact probably was, that towns, parishes and proprietors, often consisted so nearly of the same individuals, that a grant or appropriation of one of these bodies to another was little more than an appropriation by themselves in one capacity, to the use of themselves in another; from which it probably followed, that less attention was paid to such acts, than if they had been acts of alienation to strangers.

It is a settled rule of law, that any actual possession of real estate is sufficient to enable the party in possession to maintain *quare clausum fregit* against a stranger; and every one must be deemed a stranger, who can show no title and no elder possession. We are satisfied upon the evidence, that the parish have had the actual possession of the lot of land on which the meeting-house stands, together with such part of the land as has been used with it, for horse-sheds, and other purposes, and which may from these and similar circumstances, be reasonably presumed to have been annexed to and become parcel of it.

There is much ground to contend, that the early vote of the proprietors to appropriate the fifteen acres obtained by exchange from Taylor, to build a meeting-house upon, may be deemed an appropriation and annexation of the same, as appurtenant to the meeting-house, until resumed by the proprietors, if the proprietors had a right to resume it, although the subsequent acts of alienation of some parts of the fifteen acres, would seem to show that they did not consider this appropriation of the whole fifteen acres, as irrevocable. But such vote, we think, with an actual erection of a meeting-house upon a part of the land, gives an actual possession to the parish, sufficient to enable them to maintain trespass against a stranger. But without going to this extent, it seems unquestionable, that so much of the land as has been used for purposes connected with the meeting-house, as a place of public worship, must be deemed to be in possession of the plaintiffs; and without giving

Digitized by Google

First Par. in Shrewsbury v. Smith.

any opinion as to the respective rights of the proprietors and the parish, or the whole effect of their vote, we are of opinion, that a part at least of the land ploughed by the defendant was thus occupied by the plaintiff parish, and that the defendant, being a mere stranger, violated their right of possession, and became liable to this action.

The general principle, on which this case is decided, appears to us to be highly reasonable in itself and well supported by authorities.

In a recent case, trespass was brought by one who held glebe land, under a lease made by a rector, which was void by statute, and it was ruled at *nisi prius*, that the plaintiff could not recover. The argument at the bar was, that possession is deemed *primâ facie* evidence of title; but where, as in that case, it appeared that the plaintiff held under a void lease, such presumption could not arise, and therefore that possessior could not avail. But the court decided otherwise, and held that the plaintiff's possession was sufficient to enable him to maintain trespass against a wrong doer. *Graham* v. *Peat*, 1 East, 244.

In a still later case it was held, that mere prior occupancy, however recent, is *primâ facie* evidence of title, upon which the occupier may recover as plaintiff, or defend his possession, against all the world except him who has and can prove an older or better title. *Catteris* v. *Cowper*, 4 Taunt. 546.

This principle appears most reasonable and just. It is very clear, that a mere stranger cannot question the right of one in possession, or put him upon the proof or disclosure of his title. Nothing is more familiar than the rule, that where one brings an action against another, the plaintiff must prove a title or be nonsuited; the defendant is not to be called on to show his title. And there seems to be no reason why a stranger should be placed in a better situation, by taking the matter into his own hands, ploughing land, taking crops, or otherwise interfering with the right of the party in possession. Such a proceeding would be as contrary to sound policy as to legal principles. There are many cases, where acts have been done intended to constitute a good and valid title, where grants have

Digitized by Google

been made, and titles transferred, but where, through negligence, ignorance or mistake, especially where corporations, public bodies, and official agents are concerned, such titles cannot be legally proved. Upon a close investigation, a flaw in the title would be discovered. If a lawful owner in whom the legal title remains, chooses to interfere and set up his legal claims, the law, in consistency with its own rules in regard to the transmission of title, may be compelled to admit his claim. But if such owner, upon considerations of propriety, equity and conscience, chooses to acquiesce, and permit the party in possession to retain that possession, notwithstanding any defect of title, by what rule of law, of equity or sound policy, can a mere stranger be allowed to interfere and by his own act violate the actual and peaceable possession of another, and thereby compel him to disclose a title, in the validity or invalidity of which such stranger has no interest?

Defendant defaulted.

JOSEPH ANTHONY *versus* NATHANIEL WILSON *et al.*

In trespass *quare clausum* the defendant pleaded a license; upon which the plaintiff took issue. *Held*, that the plaintiff might prove that the license was obtained by fraud, without replying fraud specially, a license so obtained being not voidable, but void.

TRESPASS for breaking and entering the plaintiff's close and dwelling-house, and making search without authority. The defendants pleaded a special plea of license, to which the plaintiff replied generally, denying the license.

At the trial, before *Wilde* J., evidence was offered tending to show, that if license was given by the plaintiff to the defendants to enter the house, it was in consequence of a representation that they had a search warrant, and that the plaintiff at first forbid them.

The jury were instructed, that if they were satisfied that the plaintiff at first forbid the defendants' entering the house, and that they then showed him a paper representing it to be an authority to search, and he, believing they had such authority,

Digitized by Google

Anthony v. Wilson.

gave them leave to enter, this would support the defendant's plea, although they had no such authority.

If this ruling was incorrect, a new trial was to be granted.

Oct. 9th, 1832.

Washburn, for the plaintiff, said that a license obtained by fraud was void and not voidable only, and therefore it was not necessary to reply the fraud specially. Chit. Contr. 222; *Tresham's case*, 9 Co. 110; Gould on Pl. 152; *Johnson* v. *Carter*, 16 Mass. R. 445; Stephen on Pl. 350; Chit. Pl. 565, 599; 1 Wms's Saund. 300 *a*; *Oysted* v. *Shed*, 12 Mass. R. 508; *Lambert* v. *Atkins*, 2 Campb. 272; Bul. N. P. 172; Saund. Pl. and Ev. 527; 2 Stark. Ev. 479.

Newton and *Lincoln*, for the defendants, cited 2 Saund. Pl. and Ev. 857; 1 Chit. Pl. 514; *Sayre* v. *Rochford*, 2 W. Bl. 1165; 3d res. in *Crogate's case*, 8 Co. 67; 5 Dane's Abr. 613, § 7; Bac. Abr. *Tresp. I* 4; *Jones* v. *Kitchin*, 1 Bos. & Pul. 76; 2 Wms's Saund. 294, note; *Dorr* v *Munsell*, 13 Johns. R. 430; *Dawes* v. *Winship*, 16 Mass. R. 291.

Oct. 2d, 1833.

PUTNAM J. delivered the opinion of the Court. The issue joined was upon the license, and it was for the defendant to prove it; but the evidence proved that it was obtained by the fraud of the defendant; and the question is, whether the plaintiff should have replied specially that the license was obtained by fraud, or may deny the license (as he has done in his replication) and give the fraud in evidence to avoid the alleged license.

And this depends upon the question, whether such evidence would render the license voidable, or absolutely void.

If it were voidable only, then the cause for avoiding it should have been specially set forth in the replication. As if the license had been given, but had been revoked before the trespass, or if the license had been exceeded, or if it had been abused. There the revocation, the excess or the abuse should be specially set forth in the replication, which should conclude with a verification, to the end that the defendant might have an opportunity of denying the special matter so replied. 1 Wms's Saund. 300 *a*. In all those instances the license, whether it were by the plaintiff or by the law, was originally good, to a certain extent.

Digitized by Google

But it is otherwise where the license was merely void *ab initio*. In such a case the party may legally deny that he ever gave any license at all. If it were merely void, it may be considered as if it never had any existence.

So the rule of pleading would be in regard to specialties If the defendant were a feme covert, and so had no legal capacity to make the bond; or if the defendant were at the time a lunatic, and for that reason had no legal capacity to contract; such a party may plead *non est factum*, and the evidence of the coverture or of the lunacy would maintain the plea. The deeds in those cases would be originally absolutely or merely void. So if the deed were obtained by fraud, the defendants may plead *non est factum*. 1 Chit. Pleading, (Day's edit.) 479; Com. Dig. *Pleader*, 2 *W* 18; *Lambert* v. *Atkins*, 2 Campb. 272. In *James* v. *Fowks*, 12 Mod. 101, the court said that such matter of law as amounts to the general issue, *may be pleaded* or *given in evidence*, as the defendant pleases, for the matter of law in that case is matter of fact which avoids the action. If the deed be fraudulently misread, the defendant may plead that it is *not his deed*; and so if there were a fraudulent substitution of one deed for another, and the signature be put to that which the party did not intend to execute. *Dorr* v. *Munsell*, 13 Johns. R. 431, *per Spencer* C. J.

In those cases, there was a deed apparently well executed, and in the case at bar, there was an apparent license, but it being proved that they were obtained by fraud, they are to be held as if no deeds and no license had been given.

In the case at bar, if the plaintiff consented to have the defendant enter his house, it was upon his representation that he had a legal search warrant. The plaintiff supposed he was submitting to legal process, when in fact he was deceived by the fraudulent representation of the defendant. There was no license, independently of the search warrant which the defendant pretended to have, and that pretence failing, the license which was bottomed upon it, fails also.

The plaintiff may in pleading as well deny that he gave any license, as he might that he made any deed, which was obtained by fraud. In legal intendment, there was no license at all.

Digitized by Google

Anthony v. Wilson.

We are therefore all of opinion, that the verdict must be set aside and a new trial granted.

JOSIAH CORBIN *versus* JOHN BROWN *et al.*

In trespass *quare clausum* for filling up a trench dug by the plaintiff for the purpose of conducting water from a pond to his mill, the defendants pleaded in justification, that they had a right to erect a dam at the outlet of the pond, to raise the water there to any height they should see fit, and to draw off the water whenever they should see fit, for the use of their mill; wherefore they entered, &c.; to which the plaintiff replied, *de injuriâ*, &c. It was *held*, that evidence on the part of the defendants, that they had a right to a reasonable use of the water, and an instruction to the jury to that effect, would have been irrelevant to the issue joined, and therefore, the omission by the court to give such instruction was not a sufficient ground for granting the defendants a new trial.

TRESPASS for taking up the plaintiff's dams and causing the water detained by them, to run to waste; and also for filling up a trench made by him to conduct the water to his saw mill.

The defendants pleaded three pleas in justification, upon the two first of which no question was made at the argument. In the third they allege, that they are lawfully seised and possessed of the Dudley Woollen Manufactory, &c., and have and ought to have the free and uninterrupted use and benefit of a certain brook or water-course from Hayden pond, without any let or hindrance to their water privileges, for the purpose of working their machinery there; that in 1811 they acquired a right of erecting a dam at Hayden pond, to raise the water there to any height they should see fit, and also of putting into the dam a sluice or flume to draw off the water from the pond whenever they should see fit; and also the right of digging at the outlet of the pond, so as to drain the same, and also to turn into the pond a small brook, called Mansfield brook, running thereby; and that they then became seised and possessed of so much land at the outlet of the pond as might be necessary for the full enjoyment and exercise of all the rights and privileges before mentioned. Then they set forth their use of these privileges until the plaintiff made his trench, which they say injuriously drew off, diverted and obstructed the water

Digitized by Google

preserved in their reservoir, and so prevented the same from passing down the natural channel to their manufactory; wherefore they entered into the close &c. and filled up the trench, &c.

The plaintiff replied, *de injuriâ &c.*; so, in effect, traversing the rights set forth by the defendants.

On the trial, before *Putnam* J., it appeared that the defendants were the owners of a factory, grist and saw mill, all in Dudley. About two miles higher up the stream on which these mills are situate, the plaintiff has a saw mill, and about a hundred rods above the plaintiff's saw mill is a natural pond, called Hayden pond, from which, in its natural state, a small stream flowed; so small in dry weather, as to be wholly insufficient for mill purposes, but in the spring, and after copious rains, it had water which might be employed in that way. In 1811 the defendants became the owners of the privilege first mentioned, and erected thereon a woollen factory, and at the same time they procured a conveyance to themselves from the owner of the land at the outlet of Hayden pond. The privilege of erecting and maintaining a dam across this outlet, by means of which the surplus waters in times of rain and freshets could be collected into Hayden pond as a reservoir, and the privilege of diverting the course of Mansfield brook into the pond, were obtained from the same person.

The defendants, in 1819, built a dam at the outlet of Hayden pond, so as to raise the water therein about eight feet, for the use of their mills, and at the same time turned into the pond the Mansfield brook, which before that time fell into the stream passing from the outlet of the pond, about twenty rods below the pond and before it entered the land of the plaintiff. The waters thus collected in the pond as a reservoir, were kept back by the owners of the factory, to be used when the natural flow of the streams should become insufficient for their purposes, and when their reservoirs below should become exhausted. The defendants had a large reservoir of about seventy acres, and sufficiently capacious to contain all the waters of the Hayden pond reservoir, situate above their factory and below all the plaintiff's dams, the waters in which reservoir were drawn off by the defendants before they began taking

Digitized by Google

Corbin v. Brown.

water from Hayden pond. The defendants used these waters without interruption till 1826, when the plaintiff erected a saw mill about a hundred rods below Hayden pond, and at the same time cut a trench at some distance from the outlet of the pond, so deep as to be sufficient thereby to take off about three feet of the waters which would be reserved by the dam erected at the outlet. This trench conducted the waters into a deep ravine or basin, and from thence a trench was dug by the plaintiff to his saw-mill pond. In the latter trench he placed a flume, which being kept closed, would, as the plaintiff contended from the evidence, keep up the waters in the ravine and also in Hayden pond, to the height to which the waters would then be raised by the dam at the outlet.

It appeared also, that the plaintiff had an ancient privilege of watering his mowing land below Hayden pond and near his saw mill, at any and all times; and the detention of the water above in Hayden pond, as the plaintiff contended upon the evidence, prevented his usual enjoyment of this privilege.

The defendants contended, that it was lawful to detain water to some extent, as this right is indispensable to the enjoyment of mill power; that when water is detained for mill purposes, the only question is, whether it is unreasonably detained, to the injury of a proprietor lower down the stream; that if the jury should be satisfied that the plaintiff's mill was more benefited than injured by the defendant's reservoir, he had no ground of complaint, and therefore could have no right to draw off the reserved water or to keep a trench open for that purpose; that the diversion of Mansfield brook was not distinguishable from a detention of the water by a dam across the brook, and could not be complained of, as all the water did eventually flow to the plaintiff's mill.

The judge instructed the jury, that the plaintiff, being no party to the contract by which the defendants became the owners of the outlet of Hayden pond, was not to be affected thereby, but was entitled to the run of the water as in its natural state; that the defendants could not lawfully divert Mansfield brook into that pond, to the prejudice of the plaintiff, without his consent; that the plaintiff had a right, by digging a trench into and tapping the pond, to secure and pre-

Digitized by Google

serve as much water as would have flowed to his saw mill, if there had not been any diversion of the brook into the pond; that as the defendants had diverted the brook into the pond, so mingling the waters without the consent of the plaintiff, the jury should take care that the plaintiff should be permitted to take his full quantity of water as he pleased and when he pleased, but that if by means of the trench he drew more than he would have had by the natural run of the waters, then he went beyond his right; that if the trench had the capacity to take off the water from the surface of the pond, but was not used by the plaintiff to the prejudice of the defendants, any further than to obtain as much water as would have run in the natural streams, then it was not a nuisance and the defendants had no right to abate it; but that otherwise they had; leaving it to the jury to determine what quantity of water the plaintiff would have obtained by the natural run of the streams, and what he did obtain by means of the trench which he opened into Hayden pond.

After the cause was summed up, in consequence of a misapprehension on the part of the counsel, time was allowed to the defendants to produce evidence on the question, whether the plaintiff had in fact drawn off any water from the Hayden pond reservoir; and the defendants afterwards offered evidence, a part of which was rejected by the judge. The jury found a verdict against the defendants, for filling up the trench made by the plaintiff.

If the evidence rejected ought to have been admitted, or if any of the instructions to the jury were erroneous, a new trial was to be granted; otherwise judgment was to be rendered on the verdict.

The cause was argued by *J. Davis* and *Barton* for the defendants, and *Merrick* and *Tufts* for the plaintiffs. Oct. 8th, 1832.

Putnam J. delivered the opinion of the Court. The defendants justify entering upon the plaintiff's land and filling up a trench which he had made there, because, as they allege, the trench was a nuisance to them, inasmuch as it was made, and was in fact used, for the purpose of taking off the water from heir reservoir in Hayden pond. Oct. 5th, 1833.

The case finds that the plaintiff had an ancient privilege of

Digitized by Google

Corbin v. Brown.

watering his mowing land below Hayden pond and near his saw mill, at any and all times. This finding was the result of the evidence at the trial, which clearly proved that the plaintiff and those under whom he claims, have used this right of irrigation for more than forty years; and that it was so used immediately after haying.

The defendants' dam at the outlet of Hayden pond, for a reservoir, was built in 1819. The trench was dug by the plaintiff in 1825, for the purpose of getting the water, and as much as would have run in its natural courses, to his saw-mill pond, but his saw mill was not built until 1826; though the dam to his pond there was built before that time and was used to raise a head of water for the purposes of irrigation. The trench had the capacity to take off three feet of the surface of the Hayden pond reservoir, if the flumes which were in it were kept open. There was contradictory evidence as to the quantity of water which the plaintiff in fact obtained by means of the trench. The jury were instructed as is set forth in the report of the case.

But the defendants contend that the instruction should have been, "if the water had not been unreasonably detained, the plaintiff had no right to open the trench into Hayden pond and take off the water; that they had a right to detain the water to *some extent*; that such a right is indispensable to the enjoyment of mill power; and that when water is detained for mill purposes only, the question is, whether it is, or not, unreasonably detained, to the injury of the proprietor lower down the stream; and that as the waters of Mansfield brook and of Hayden pond were united before they reached the plaintiff's dam, the detention of the water as the defendants detained it, was in no way to be distinguished from a detention by a dam across Mansfield brook, as it all eventually ran to the plaintiff's mill pond."

The defendants in effect requested such instruction to be given to the jury. But we are now to take it that such instruction was not given, but only the instruction which is above set forth.

It has been said at this argument, that at the trial not much attention was paid to the pleadings, either by the counsel o

Digitized by Google

by the court. That was the fact; and it is to be regretted that more attention was not paid to the issue joined by the parties upon this part of the case. It would have prevented much controversy. We must look now into the whole record, and if such instruction should have been given, as the defendants contended for, a new trial should be granted. If it would have been irrelevant to the issue, it would seem to be equally clear that the court ought not to have given it.

Now the defendants, in their third plea, claim a right to dam and pen up the water in Hayden pond as high as they please, and to draw it off whenever they think fit. This right is denied by the plaintiff, in his replication.

The defendants do not, even in argument, contend for such a right, but only for a modified or qualified right to detain the water for mill purposes, in a reasonable manner. Their counsel requested the judge to instruct the jury, that they had a right to detain it to some extent, in a reasonable manner, for mill power. But if the jury had been so instructed, of what benefit would it have been to the defendants? How could the qualified right to use the water reasonably, so as not to prejudice the proprietors below, maintain the absolute right to draw off the water just when they saw fit to do so, with or without reason, just as it should please themselves? The claim set up by the defendants in their plea, is subversive of the prescriptive right of the plaintiff to use the water as heretofore he has done, for the purpose of irrigation, as well as of his right to the use of it for mill purposes, upon his own land. The jury could not find a verdict for the defendants upon this issue, without affirming an unlimited right in them to detain the water *ad libitum*. If the defendants do not maintain such a right, they must fail. The jury must find that they did the alleged trespass for the cause or reason by them set forth. The burden of proof is upon them. Any other right short of that pleaded in justification, could not have been properly given in evidence, or have been declared by the court in their charge to the jury, as relevant, or as a sufficient matter of defence for the defendants.

In this view of the case the inquiry that was made towards the close of the cause, and after the charge had commenced,

Digitized by Google

Corbin v. Brown.

was wholly immaterial; for if the defendants failed to establish by proof the right set forth as their justification, it was a matter of no consequence to settle, whether the plaintiff drew more or less water through the trench, than would have passed in the natural run of the brooks.

It may be said that the proof of a qualified right might weigh with the jury in regard to the damages, as it would rebut any claim as for a wanton trespass; but the jury have given only nominal damages.

All that the jury have affirmed in their verdict is, that the defendants have not an absolute unqualified right to stop and pen up the waters of Mansfield brook and Hayden pond without any regard to the plaintiff's right to the use of the same for irrigation and mill power. And as before observed, the defendants themselves do not, even in argument, contend that they have such an unqualified right as they have set forth in their plea. A new trial would clearly be of no utility to the defendants as the facts and the pleadings now stand.

And in this stage of the cause the Court would not be disposed to allow the defendants to plead new matter of justification. If the parties are disposed to litigate this subject further hereafter in any other action, the precise rights which the defendants now claim may be raised by the pleadings, and the Court is not inclined to anticipate the opinions that may be given when the points may be more properly presented.

Morton J. dissented.

Judgment according to verdict.

Digitized by Google

ELIJAH DAVIS, in Review, *versus* ICHABOD ALLEN.

After a commission to take a deposition in another State has issued, with interrogatories filed on both sides, it is doubtful whether the party taking out the commission is at liberty to cause the deposition to be taken without reference to the commission. But if this is allowable, he must prove, that he has elected to suppress the commission and take the deposition in the mode provided by statute, that he has given notice thereof to the other party, that the person taking the deposition was duly qualified, and that the other party had notice of the time and place of taking.

A deposition taken under a commission is not admissible in evidence, unless it appear by the certificate of the commissioner, that the interrogatories annexed to the commission were propounded to the deponent, and that the deposition was taken in pursuance of the commission.

ASSUMPSIT. At the trial, before *Morton* J., the plaintiff offered in evidence the deposition of Asa Anderson. This deposition, which was sealed up and directed to the Court, purported to be taken by a justice of the peace in the State of Vermont, and was enclosed in an envelope, together with a commission for taking the testimony of Anderson. The envelope was also sealed and addressed to the Court.

The commission, which was issued by the clerk in vacation, and was addressed to any justice of the peace &c. in the county of Rutland in Vermont, authorized and requested the justice to examine Anderson particularly in answer to the interrogatories and cross-interrogatories annexed to the commission.

In the caption, which was in common form, it was certified that the plaintiff was present at the taking of the deposition; and that the defendant had no notice of, and was not present at the taking; and no reference was expressly made to the commission, or the interrogatories or cross-interrogatories annexed thereto, either in the caption or deposition.

The defendant objected to the admission of this deposition:

1. Because it was not proved that the person by whom the deposition was taken, was a justice of the peace or authorized to take depositions.

2. Because, by the caption and certificate of the supposed justice, it appeared, that the defendant had no notice of, and was not present at, the taking of the deposition.

3. Because it did not appear, by the deposition or caption

Digitized by Google

Davis v. Allen.

that the deposition was taken by virtue of, or in conformity with the commission.

4. Because it did not appear in any part of the deposition, that either the interrogatories or cross-interrogatories had been propounded to the deponent, or that they had been severally answered by him, as required by the commission.

The deposition was notwithstanding admitted.

The jury returned a verdict for the plaintiff. The defendant moved for a new trial, on the ground of the admission of the deposition.

Oct. 2d. *Merrick* and *W. S. Hastings*, for the defendant, contended, that the deposition was not admissible, either as taken under *St.* 1797, *c.* 35, § 6, or under the 11th rule of this Court, contained in 16 Mass. R. 373. They cited *Barnes* v. *Ball*, 1 Mass. R. 73; *St.* 1817, *c.* 181; *Haynes* v. *Morgan*, 3 Mass. R. 208; *Thompson* v. *Hatch*, 3 Pick. 512; *Bailis* v. *Cochrane*, 2 Johns. R. 417.

J. Davis, *C. Allen*, and *Washburn*, for the plaintiff, said that, in fact, the deposition contained answers to all the interrogatories and cross-interrogatories and nothing more, and that it was manifestly taken in reference to the commission. They cited *The King* v. *Kingston*, 8 East, 41; *Ex parte Swartwout*, 4 Cranch, 431.

Oct. 5th. Shaw C. J. delivered the opinion of the Court. The only question in the present case is, whether the deposition, taken in the manner and under the circumstances stated in the report, was admissible; and the Court are of opinion that it was not.

It is not admissible as a deposition taken under the general law. After a commission has issued, with interrogatories filed on both sides, it is, to say the least, doubtful whether a party is at liberty to go and take the deposition without reference to the commission. But if allowable at all, it should be held to the strictest rules of law. The party must not only show that he has elected to suppress the commission, and take the deposition in the mode provided by statute, and given notice thereof to the other party, but he should be held to prove that the person taking it was a magistrate duly qualified to take depositions, and that the adverse party had actual and full notice of the time and place of taking.

Digitized by Google

As a deposition taken under the commission, it is not admissible, because though returned under the same envelope with the commission, it does not appear that the interrogatories annexed to the commission were propounded. It should appear affirmatively, and under the certificate of the commissioner, that it was taken in pursuance of the commission. It is not sufficient, that the Court may conjecture from the contents of the deposition, that the interrogatories were put to the witness; being upon the same general subject of inquiry, there might naturally be a resemblance, in the subject matter, although the interrogatories of the commission were never put to the deponent.

New trial ordered.

ZEBULON CARY *versus* HARVEY BANCROFT.

A negotiable note was made to the plaintiff by the defendant, who held a note made by the plaintiff but had it not with him at the time, and it was agreed that the two notes should be set off, one against the other, so far as the smaller would pay the larger. It was *held*, that this agreement was executory and therefore was not an extinguishment of the smaller note.

A plea of tender is not supported by proof of a tender of a promissory note due from the plaintiff to the defendant.

ASSUMPSIT to recover the amount of an account annexed to the writ. Trial in the Common Pleas, before *Williams* J., upon the general issue and a plea of tender.

The action was prosecuted for the benefit of Cyrus Stockwell, to whom the nominal plaintiff, Cary, on January 21, 1832, being in failing circumstances, assigned the account for a valuable consideration.

The defendant filed in set-off an account against Cary for money had and received and money paid, and also filed, as evidence in support of the account, a note which he held against Cary, given to the defendant on March 19, 1831, by which Cary promised to pay the defendant or order, on demand, with interest, the sum of $25·54.

The defendant proved that before the commencement of this suit, on February 7, 1832, he tendered to Stockwell the above

Digitized by Google

Cary v. Bancroft

mentioned note, together with $4·75 in money, in full of the account sued. He did not, at the time of the tender, state to Stockwell the amount which he tendered, nor did Stockwell inquire as to the amount or examine the same; but the defendant said that if he had not tendered enough he would produce enough.

The plaintiff introduced evidence tending to show, that on December 5, 1831, the defendant, at the plaintiff's store, gave the plaintiff a note on demand, with interest, for $34·08, and that the defendant not having with him his note against the plaintiff, it was then and there agreed between them, that the two notes should be set off one against the other, so far as the smaller would pay the larger.

The defendant then proved that the plaintiff, for a valuable consideration, in January, 1832, indorsed the note given to him by the defendant, to one Goddard, to whom the defendant paid the amount thereof before the tender above mentioned. It did not appear that the defendant, at the time of this payment, had notice of the assignment to Stockwell, of the account sued in this action.

Upon these facts the judge instructed the jury, that the tender was well made, and that the defendant had a right to have his account filed set off against the plaintiff's account sued.

The jury returned a verdict for the defendant, and the plaintiff filed his exceptions to the instructions of the judge.

1st. 4th. *Newton* and *Lincoln*, for the plaintiff, to show that the tender was insufficient, cited 5 Dane's Abr. 486; *Brady* v. *Jones*, 2 Dowl. & Ryl. 305; *Alexander* v. *Brown*, 1 Car. & Payne, 288; Roscoe on Evid. 262; *Strong* v. *Harvey*, 3 Bingh. 304; *Hallowell and Aug. Bank* v. *Howard*, 13 Mass. R. 236.

Davis and *Washburn*, for the defendant, cited in regard to the tender, *Wade's case*, 5 Co. 115; Bull. N. P. 155; 5 Dane's Abr. 485; 3 Stark. Evid. 1392; *Douglas* v. *Patrick*, 3 T. R. 683; *Breed* v. *Hurd*, 6 Pick. 357; and in regard to the set-off of the notes, *Sargent* v. *Southgate*, 5 Pick. 312; *Green* v. *Hatch*, 12 Mass. R. 195; *Field* v. *Nickerson*, 13 Mass. R. 131; *Dix* v. *Cobb*, 4 Mass. R. 511; *Jones* v. *Witter*, 13 Mass. R. 307.

Digitized by Google

Cary v. Bancroft. Oct. 5th

SHAW C. J. delivered the opinion of the Court. In the first place we think it clear, that the agreement made between the plaintiff and defendant, at the time that the note for $34·08 was given, that that and the defendant's note for $25·54 should balance and be set off, one against the other, so far as the smaller would pay the larger, if available at all, was an executory contract, requiring some further act to be done, before the one would operate as payment or extinguishment *pro tanto* of the other. It is like an agreement not to sue, executory and collateral, not affecting the terms of the note till executed. *Dow* v. *Tuttle*, 4 Mass. R. 414. The note held by Cary against the defendant was then a good subsisting negotiable note, and passed by the indorsement to Goddard, subject perhaps to Bancroft's set-off if Goddard received it with actual or constructive notice. But as Bancroft was indebted to Cary on another account, larger than the amount of the note he held against Cary, and had no notice that this account had been assigned to Stockwell, it cannot be considered that he paid the note to Goddard in his own wrong.

As the agreement above mentioned did not operate as payment or extinguishment, but left the note of Cary against Bancroft a good subsisting note, capable of passing by indorsement, so Bancroft's note was a good subsisting note, to avail by way of action or set-off as he might choose to apply it. Stockwell therefore took the assignment of Cary's account against Bancroft, subject to the right of the latter to set off this note; to this extent therefore, it supported the defence.

But upon the other point, the Court are of opinion, that the plea of tender cannot be supported by the evidence. A plea of tender must show an unqualified offer to pay the whole amount, and of course admits the whole to be due. In this respect, it differs essentially from the payment of money into court, under a rule, which would have been the proper course in the present case. A plea of tender admits the amount due, and a readiness at all times to pay it. But a set-off, though to a certain extent it admits the plaintiff's claim, yet sets up a counter, independent demand and cause of action, as a legal reason why the defendant should not be held to pay it.

Digitized by Google

Cary v. Bancroft.

Besides, a man may withdraw his account in set-off, before judgment upon it, and bring a separate action upon it, and therefore tender or notice of set-off, did not extinguish the note, and the defendant was not bound by it. *Brady* v. *Jones*, 2 Dowl. & Ryl. 305.

Verdict set aside and new trial granted.

Nathaniel Paine, Judge &c., *versus* Solomon Parsons.

A father executed his will, whereby he bequeathed to his daughter the sum of $ 268, to be paid to her *at her marriage*, in money or such articles of personal estate, at cash price, as she might choose. Upon the subsequent marriage of the daughter, the father furnished to her certain articles and money, to the amount of $ 147·49, and on the day of the marriage entered a charge thereof in a book of accounts; he afterwards paid her $ 50, and took a receipt therefor from her husband, as for part of her portion, and also paid an order for $ 20·60, drawn upon him by the husband, which order was found pinned to the leaf in the book upon which the account was entered, together with the receipt. The father, several years subsequent to these payments, executed a codicil, in which he bequeathed to his daughter $ 100, "in addition to what he had before given her." Repeated declarations were made by the father, both before and after the execution of the codicil, that he had paid off a portion of what he had bequeathed to his daughter. It was *held*, that the republication of the will by the execution of the codicil, did not rebut the presumption, that the advances and payments made by the father were intended as an ademption *pro tanto* of the legacy given in the will; and that the charge in the book, the receipt, and the order, were legal and sufficient evidence of such payments.

Debt on a probate bond given by the defendant as executor of the will of Solomon Parsons, deceased.

The parties stated a case.

On October 3, 1818, the testator made his will, which contained the following clauses: "I give to my daughter, Sally Parsons, her support in sickness and health, in every thing necessary for her, except her clothing, so long as she shall live single and receive the same at my house, to be furnished and paid out of the profits and income of my estate. I do also devise to her the use, for the same term, of my north room, in the dwelling-house, if she wishes to occupy it. I also give to my said daughter Sally, $ 268, to be paid to her *at her marriage*, in money or such articles of personal estate, at cash

Digitized by Google

price, as she may choose, at the choice of my son hereafter named. I also give her one of my beds, bedsteads and suitable bed-clothing for the same." On April 10, 1822, the testator's daughter Sally was married to Benjamin N. Childs. On June 29, 1830, the testator made a codicil to his will, which contained the following bequests; "I further give to my daughter Sally, (now Sally Childs), $100, within one year after my death, and to my daughter Elizabeth, (now Elizabeth Bryant), $100, in two years after my death, to them and their heirs, in addition to what I have before given them, to be paid by my executor." The will and codicil were duly proved on June 7, 1831.

This action was brought for the benefit of Benjamin N. Childs, to recover the legacies given to his wife in the will and codicil.

It appeared that until their marriage, she had resided and labored in the family of the testator; that about the time of the marriage, the testator furnished to her certain articles and money, to the amount of $147·49, and on the day of the marriage entered a charge thereof in a book of accounts, under the title of "Inventory of articles Sally Parsons has had of my estate;" that he paid her $50, and took a receipt therefor from B. N. Childs, dated November 29, 1823, as for part of her portion; that he also paid an order for $20·60 drawn upon him by Childs, dated December 25, 1823, which order was found pinned to the leaf in the book, upon which the account was entered, together with the receipt.

It also appeared that the testator declared, that the order was paid in part of the legacy given to his daughter Sally; that before the codicil was made, he had frequently declared, that he had nearly paid off the legacies given by his will, to his daughters, and had stated, in some instances, the manner in which he had done it; and that after the making of the codicil, repeated declarations were made by him, which he called on witnesses to remember, that he had paid all that he had bequeathed to his daughter Sally, except the sum of $150; but it did not appear, that these declarations were made in the presence of Childs or his wife.

It further appeared that the defendant had paid $150 to Childs on April 22, 1831.

Digitized by Google

Paine v. Parsons.

If these facts were admissible in evidence, and constituted a defence to the action, the plaintiff was to be nonsuited; if otherwise, the defendant was to be defaulted, and the damages to be assessed by the Court.

Oct. 4th.

Newton and *Lincoln* for the plaintiff. The payments and advances made by the testator to his daughter and her husband, after the execution of the will, were not to be deemed an ademption *pro tanto*, of the legacies given to her in the will. The codicil operated as a republication, and rebutted any presumption that they were intended by the testator, as an ademption. *Robinson* v. *Whitley*, 9 Ves. 577; *Holmes* v. *Holmes*, 1 Bro. C. C. 555; Matthews on Presumptive Evid. 140; *Bird* v. *Hooper*, Prec. in Chan. 298; *Bulkeley* v. *Noble*, 2 Pick. 340. As to the order, there is no evidence that it was regarded as a part payment of the legacy in the will; if it had been so considered by the testator, he would have entered a charge of it in the book of accounts.

Davis and *Washburn*, for the defendant, as to the question of ademption, cited *Husbands* v. *Husbands*, 1 Vernon, 95; *Jenkins* v. *Powell*, 2 Vernon, 115, and note; *Cookson* v. *Ellison*, 2 Cox Eq. Cas. 220; *S. C.* 2 Bro. C. C. 307; *Dwyer* v. *Lysaght*, 2 Ball & Beatty, 156; Toller on Executors, 329; 2 Madd. Ch. Pract. 78; *Hall* v. *Davis*, 3 Pick. 450; Hammond's Eq. Dig. 752.

Oct. 5th.

Shaw C. J. delivered the opinion of the Court. In debt on a probate bond, the general question is, whether certain advances and payments, made by the testator in his lifetime to his daughter and to her husband, after her marriage, are to be considered as an ademption and satisfaction *pro tanto* of legacies given to her by his will. The general rule seems well settled, that an advancement of money or goods to a child, especially on marriage, is presumed to be an ademption of a legacy, for like money or goods specified in a will previously made by the father, on a presumption that it was so intended. The general rule is not much contested in the present case; but it is insisted that such a presumption is rebutted by the fact, that the testator, after the marriage of his daughter, and after the delivery of the money and goods, made a codicil operating by way of republication of his will, by which he gave

Digitized by Google

the same daughter $100, in addition to what he had before given her. But the Court are of opinion, that the republication of the will by the codicil, did not rebut the presumption of ademption and satisfaction of the legacy given by the will, or change the general rule. There is nothing in the fact itself, or in the circumstances of the case, to indicate such an intent on the part of the testator. The effect of the codicil, in giving her $100 in addition &c., was to indicate an intent that on the whole she should have out of his estate, by testamentary provision, $100, in addition to what he had before contemplated, and that he did not mean to disturb or affect what had been then already done.

The charge on the testator's book is legal proof of the payment and advance; and the gift by the will being of $268, in goods and furniture, payable to her upon her marriage, and the actual advance being of money, and goods and furniture, at the time of her marriage, the gift so far connects itself with the legacy, in these particulars, as to strengthen the conclusion, that the gift was by way of portion and in anticipation of the legacy, and, of course, amounts to ademption and satisfaction *pro tanto*.

The charge in the book was in conformity with the provisions of the statute of descents and distributions, directing what shall be evidence of an advancement, in case of an intestate; *St.* 1805, *c.* 90, § 3; and being in a case strictly analogous, and within the principle, if not within the terms of the statute, is to be considered legal evidence.

As to the receipt there is no question; but as to the small order found pinned to the leaf of the book, in which the charges were made, there is certainly more doubt. Considering however the length of time the order had remained uncalled for, the place where it had been fixed by the testator, among other vouchers preserved as evidence of advancement, we think it was evidence of the intent of the testator to treat it as an advancement, and therefore that it operates as payment and ademption *pro tanto*.

If no other breach of the bond is established, the defendant will be entitled to judgment

Digitized by Google

Elzaphan Taft *versus* Thomas Buffum *et al.*

A conveyance by a partner, of his interest in all the personal and real estate of the firm, to one of his copartners, does not *ipso facto* dissolve the copartnership; it is only evidence tending to show a dissolution.

Assumpsit on a promissory note, dated November 24, 1828, signed by Thomas Buffum & Co., and payable to the plaintiff.

The defendants plead in abatement, that if they made any such promise, it was with Horace Buffum. On this point issue was joined.

The persons sued were Thomas Buffum, William Buffum junior and Benedict Arnold. At the trial, before *Morton* J., it was proved that these persons, with Horace Buffum, entered into copartnership in 1825, in the business of manufacturing cotton; that they were the owners of the greater part of a cotton mill at Northbridge, and the lessees of another at Fitchburg, which were in operation; that their business was to manage the concerns of these mills; that they had a counting-house in Providence, Rhode Island, where Horace transacted the concerns of the company, such as shipping the goods, buying stock, drawing drafts, making bills, &c., which he continued to do until the 6th of June 1828, when he conveyed to Thomas his interest in the whole personal and real estate of both these establishments. It was testified, however, that notwithstanding this conveyance, Horace still continued a member of the firm and transacted their business in the same manner as before, until January, 1829, when the company failed. On the 11th of August, 1828, Horace and the three defendants, by the name of Thomas Buffum & Co., mortgaged their machinery in Fitchburg to the Smithfield Union bank. On the 13th of January, 1829, these four persons, under the name of Thomas Buffum & Co., assigned their estate, real and personal, at Fitchburg, to Thomas Burgess and Peter Platt, for the benefit of their creditors. On the same day Thomas Buffum, William Buffum and Benedict Arnold, under the name of Thomas Buffum & Co., conveyed the real estate at Northbridge, by a separate deed, to the same assignees, and this

Digitized by Google

deed is referred to in the first mentioned deed of assignment. There was no other proof than the above, of any acts under the deed of June 6th, or of any knowledge thereof on the part of William Buffum and Benedict Arnold; nor any other proof of more than one company doing business under the name of Thomas Buffum & Co., than what arises from the last mentioned deeds.

Morton J. instructed the jury, that the deed of the 6th of June, from Horace to Thomas Buffum, dissolved the copartnership as to Horace.

The jury returned a verdict for the plaintiff, and the defend ants objected to the above instruction.

B. Adams, *J. Davis* and *Washburn* argued that the deed of June 6th did not operate a dissolution of the partnership, for Horace still continued to furnish his skill and labor and credit, and there was still a community in profit and loss. 3 Kent's Com. 3; Montag. on Partn. 3; *Kingman* v. *Spurr*, 7 Pick. 235. If the deed had been given to a stranger to the firm, it would have dissolved the partnership. *Marquand* v. *New York Man. Co.*, 17 Johns. R. 535; *Ketcham* v. *Clark*, 6 Johns. R. 144. *Oct. 3d.*

Newton contrà. Where a partner's contribution to the partnership fund, consists of labor and skill and property, the subduction of either without the consent of his copartners, is a dissolution of the firm. *Ex parte Smith*, 5 Ves. 295; *Whitman* v. *Leonard*, 3 Pick. 177; *Griswold* v. *Waddington*, 15 Johns. R. 57; *Waters* v. *Taylor*, 2 Ves. & Beame, 300. The conveyance by Horace Buffum to Thomas Buffum, being made without the knowledge of the other two copartners, was a fraud upon them. Previously to that conveyance one-fourth only of the partnership fund was liable for the debts of Thomas, and subsequently, one half. The circumstance that the conveyance was made to one of the firm and not to a stranger, is immaterial, for Horace no longer had the same control over the property, nor probably the same zeal to promote the interest of the company. This was a change in the partnership concerns which was not contemplated by the copartners.

PUTNAM J. delivered the opinion of the Court (*Morton* J. dissenting.) If it could be maintained that an individual, who *Oct. 7th*

Digitized by Google

Taft v. Buffum.

had no property in the stock of a copartnership, (other than what might arise in the shape of profits,) could not legally be considered as a partner, it would seem to follow, that the instruction given by the judge who tried this cause, in respect to the operation of the deed from Horace to Thomas Buffum, would be correct. But we know of no authority to that point, and we think the position is not tenable. In fact, the skill and services of an individual may be justly valued as a full share of the stock which the others who associate with him, may put or bring into the common enterprise. At any rate, the proportion would be regulated by the associates, at the time of forming their connexion. For example, suppose four persons, A, B, C & D, associate for a common object or business. If A, B & C have each $ 1000 property and bring that into the joint concern, and D has not a dollar of property, but possesses skill which the other three associates should consider to be worth $ 1000, if employed for the joint use of the concern, so long as it should be carried on, under such circumstances, if the parties should accordingly commence upon the business, each to share profit or loss equally, we cannot doubt but that D would be legally a copartner; as much so as he would have been if he had put $ 1000 into the stock, instead of contributing his skill in the management of the business. How much of the stock should be taken by each at the dissolution of the partnership, would depend upon the agreement of the associates. It might be that D should only carry away his share of profits, or he might have a percentage upon the stock. It might be, that he having nothing to bring to the establishment at first, but his skill and services, his proportion of profit and loss might be rated at less than one quarter part; or if the skill were of a high order, it might be well rated at more. That would be altogether a matter to be settled by the associates. But D would be as much a copartner, whether he was to have a fourth or a fortieth part of the profits. Again; suppose that at the time of making the agreement of partnership, D had $ 500, and each of the others $ 1000, and that D's skill should be estimated at $ 500, and that they were to share profit and loss equally, but that in the prosecution of the work it should be manifest that D's skill and services were greatly underrated.

Digitized by Google

and the other associates should therefore agree that he should take out his $500 for his own use, which sum should be supplied by his associates, and the same division of profit and loss should be made as before. We think that such an arrangement would not *necessarily* operate as a dissolution of the connexion. We have seen that it might originally have been good and binding. It would be like any other distribution of the funds among the individuals, or some of them, composing the copartnership. The whole stock of the common concern would be liable to creditors, and the individuals would be also personally liable, jointly and severally, to the creditors. A majority of the Court are of opinion, that the deed of Horace to Thomas Buffum of the 6th of June, 1828, did not *necessarily* operate as a dissolution of the partnership, which the case finds was in existence when it was made. I would however state here, that our confidence in this point is somewhat lessened from the consideration, that our learned brother who tried the cause, retains the same opinion which he then entertained, that the deed did necessarily operate as a dissolution. A majority of the Court are of opinion, that it was evidence in the case, which might or might not prove a dissolution, as other facts might be proved in the case, all of which should have been left to the jury, to determine the fact whether the copartnership had been dissolved or not. For example; if after the deed, Horace had ceased to have any concern in the establishment, had entered into other business on his own separate account, or as it might be, had removed to a foreign country or place, and there carried on business for himself or lived upon his own funds or otherwise, upon such evidence we should all think that the jury ought to find that the copartnership was dissolved. On the other hand, if (as in the present case it is found) Horace, after his deed to Thomas, continued to act as a partner, making himself liable as such by drafts and other partnership business, just as he had done before the giving of such deed, then it would seem to a majority of the Court, that the jury ought to find that the partnership was not dissolved. For the reasons before mentioned, a majority of the Court are of opinion, that the verdict should be set aside and a new trial granted

Digitized by Google

Ebenezer Drury and Seth Wyman, Junior, *versus* Richard S. Fay.

The sureties in a guardianship bond given by two guardians as principals, having become dissatisfied with their responsibility, took by way of security the written promise of a stranger, in which he acknowledged the receipt of a certain sum of money from one of the guardians and promised to apply it towards indemnifying the sureties from the bond. The guardians kept separate accounts, and from each of them there was due to the ward a balance, which the sureties were compelled to pay. The balances were severally less, but in the aggregate, more, than the sum mentioned in the written promise. In an action by the sureties upon this promise, it was *held*, that even if no money was received by the promisor, still there was a valid consideration for the promise, because the sureties were thereby diverted from instituting legal proceedings to obtain a discharge from their liability on the bond.

But it was further *held*, that the promisor was estopped to contradict his acknowledgment of having received the sum of money mentioned in his contract.

Held also, that the sureties were entitled to recover the whole of this sum, notwithstanding they had also taken security from the other guardian.

Assumpsit against the defendant as administrator on the estate of Lawson Valentine. Trial before *Morton* J.

In November, 1818, Samuel Haven and Henry Valentine were appointed guardians of a spendthrift, and executed their bond to the judge of probate, with the plaintiffs as sureties, for the faithful performance of that trust.

On February 1, 1821, the plaintiffs requested Henry Valentine to give them security for their liability for him on the bond, and thereupon Lawson Valentine, the defendant's intestate, signed the writing, upon which this action was brought, and which was as follows: — "Feb. 9, 1821. Received of Henry Valentine $749·67, in consideration of which I hereby promise and engage to apply said sum towards indemnifying and saving harmless Ebenezer Drury and Seth Wyman junior from a certain bond, given by said Henry as principal and said Drury and Wyman as sureties, to Nathaniel Paine, judge of probate, &c., for the faithful discharge of the duty of guardian to Montgomery Haven &c., a spendthrift." It could be proved by parol evidence, if admissible, that no money or other consideration was paid to Lawson Valentine for his promise in this writing.

In May 1821, Samuel Haven, in order to save the plaintiffs harmless on account of their liability for him on the guardian-

Digitized by Google

ship bond, mortgaged to them certain real estate of sufficient value to pay the whole amount demanded in this action, and in 1826 they took from him personal security as a substitute for the mortgage. Samuel Haven was at this time insolvent.

In May, 1830, the administrator of the spendthrift recovered judgment on the bond against Henry Valentine and the plaintiffs, Samuel Haven having deceased after the commencement of the action and a discontinuance against him having been entered on the record for $919·35 damages. Of this amount, the sum of $708·44 was on account of property of the spendthrift received by Samuel Haven, and $210·91, on account of property received by Henry Valentine, the guardians having kept separate accounts. The whole amount of the judgment was paid on execution, by Wyman, before the commencement of this action.

For the purpose of presenting the questions of law raised in the case, the judge directed a nonsuit; which was to stand, or to be taken off and a default entered and judgment rendered for such sum as by the whole Court should be judged proper.

C. Allen and *Pratt*, for the plaintiff, said that whether Lawson Valentine received any money or not, there was a consideration for his promise, inasmuch as it diverted the plaintiffs from seeking relief by attempting to procure the removal of the guardians, pursuant to *St.* 1817, *c.* 190, § 36, or to obtain a discharge from their responsibility as sureties, pursuant to § 42 of the same statute. *Davenport* v. *Mason*, 15 Mass. R. 85; 1 Dane's Abr. 110; *Pillans* v. *Mierop*, 3 Burr. 1663, 1674.

But Lawson Valentine, by his contract, induced the plaintiffs to believe that he had received a consideration in money, and the defendant therefore is estopped to deny it. *Jewett* v. *Torrey*, 11 Mass. R. 219; *Chapman* v. *Searle*, 3 Pick. 38; *Fisher* v. *Ellis*, 3 Pick. 322.

Merrick, *contrà*, urged that the promise was without consideration, because the plaintiffs did not, in consequence of it, enter into any engagement to forbear seeking relief under the statute.

To the point, that a writing acknowledging the receipt of money, may be contradicted by parol evidence, he cited *Boutell* v. *Cowdin*, 9 Mass. R. 254; Chit. Contr. 6.

Digitized by Google

Drury v. Fay.

If the defendant is responsible at all, it is only for the sum for which Henry Valentine failed to account. The plaintiffs elected to sever the liability of the guardians, by taking separate security from each, and it is to be presumed that the security given by S. Haven continues to be an adequate indemnity against his delinquency. In case the defendant should be compelled to make a payment to the plaintiffs on account of S. Haven, there is no way in which he can obtain a reimbursement from the fund provided by S. Haven for the plaintiffs' security. *Bachelder* v. *Fiske*, 17 Mass. R. 464; *Commonwealth* v. *Vanderslice*, 8 Serg. & Rawle, 452; *Lichtenthaler* v. *Thompson*, 13 Serg. & Rawle, 157.

Allen cited, as to this last suggestion, *Bellows* v. *Lovell*, 4 Pick 153.

Oct. 7th. *Per Curiam.* The contract signed by the defendant's intestate was founded on a valid consideration, even admitting that he received no money from Henry Valentine. The principle is well established, that an injury to the promisee, occasioned by the act of the promisor, without any benefit to the latter, will support a promise. Here the sureties, having become uneasy under their responsibility for the guardians, had a right to seek to be discharged from their obligation on the bond, but upon receiving this promise from the intestate, they abstained from instituting the proceedings prescribed by the statute for that purpose. It was not necessary that they should enter into an actual stipulation for delay or forbearance.

But we think it was not competent to the defendant to offer evidence to contradict the writing on which the action is founded. Lawson Valentine therein acknowledges the receipt of a sum of money, and promises to apply it in a particular manner, for the benefit of the plaintiffs. Whether he had received it or not, they could not know, as the transaction was between him and Henry Valentine, but they might well presume that he had received it, and he could not be permitted to say tnat he had deceived them.

In regard to the amount of damages, the defendant contends that he is liable for no more than $210·91; but the question is to be determined by the contract. The promise is, to apply $749·67 towards indemnifying the plaintiffs "from a cer

Digitized by Google

sain bond given by Henry Valentine as principal and said Drury and Wyman as sureties," and not from loss occasioned by unfaithful administration on the part of Henry Valentine alone. The reference to him was merely by way of description, to designate the bond. The taking of security from Samuel Haven was not a waiver of the plaintiffs' rights on this contract, and they are entitled to recover the whole sum named in it, with interest from the commencement of the action.

Nonsuit taken off and defendant defaulted.

Silas Howe *versus* Levi Lewis.

On the breach of the condition of a mortgage, the estate of the mortgagee becomes absolute at law; and a mortgager cannot maintain trespass against the mortgagee after entry for condition broken, or against any one holding under his title, although the mortgage debt may have been paid.

Where the mortgager, having sold the land and taken in payment the note of the purchaser and agreed to extinguish the mortgage, delivered the note to the mortgagee, under an agreement that if paid (which was not done) the proceeds should be applied towards payment of the mortgage, and also deposited with the mortgagee the sum due on the mortgage, in order to stop the interest, but under an agreement that it should not be applied to the payment of the mortgage, and the mortgagee gave a receipt for the money and retained the mortgage deed and the collateral note, it was *held*, that this was not a payment of the mortgage.

The executor of a mortgagee entered for condition broken, and leased the land; in an action of trespass brought against the lessee by the mortgager, the lessee justified under the lessor, without alleging in his plea, in what capacity the lessor held the estate. Adjudged that the plea was sufficient.

Trespass *quare clausum*. Plea, soil and freehold in one Levi Farwell.

At the trial, which was before *Morton* J., the plaintiff produced evidence of the levy of an execution upon the premises, on August 9, 1830, which execution was issued, in his favor, against Willard Howe; and it was proved, that Willard Howe derived his title from Robert Fuller and Samuel Wilder, by their quitclaim deeds dated August 8, 1829.

The defendant produced a deed of mortgage, dated October 2, 1820, by which it appeared that the locus was part of a small farm, thereby conveyed by Wilder, who was the original owner, to Samuel Manning, to secure the payment of a

Digitized by Google

Howe v. Lewis.

promissory note for $500. It was also proved that Manning had deceased, and that on May 19, 1824, Farwell was appointed his executor; that on August 8, 1829, Fuller purchased Wilder's equity of redemption; and that on June 16, 1830, Farwell made an entry, for the purpose of foreclosing the mortgage, upon a lot of land, being parcel of the estate mortgaged.

Jacob Fisher testified, that, when the conveyance was made to Willard Howe by Fuller, Howe gave a note for the value of the land so conveyed, and that Fuller agreed to redeem and extinguish the mortgage.

Farwell testified, that after his entry, Fuller passed over to him the note given by Willard Howe, with the understanding, that if paid, the proceeds should be applied to the payment of the note for $500, which was secured by the mortgage; that Willard Howe's note has never been paid; that Fuller, in 1831, paid over to the witness a sum of money about equal to the amount due on the note for $500, in order to stop the interest; that there was an express understanding between the witness and Fuller, at the time when the money was paid, that the payment should not discharge the mortgage, and that the money should not be applied to the payment of the note; that however it was paid on no other account; that the witness retained possession of the note and mortgage, to defeat the title of Willard Howe and his creditors; and that a receipt was given by the witness to Fuller, when the money was so paid, but that he did not recollect the terms of the receipt, although he believed it made him accountable.

The defendant, on April 1, 1832, entered upon the locus as the lessee of Farwell, and committed the supposed trespasses complained of.

The plaintiff was nonsuited, with leave to move to have the nonsuit taken off, if the action could be maintained, and a default entered.

Oct. 3d. *J. Davis* and *Smith*, for the plaintiff, cited *Poignard* v. *Smith*, 6 Pick. 172; 8 Mass. R. 554; *Gray* v. *Jenks*, 3 Mason, 520, and cases cited; *Collins* v. *Torrey*, 7 Johns. R. 278; *Jackson* v *Stackhouse*, 1 Cowen, 122; *Vose* v. *Handy*, 2 Greenl. 322; *Mayward* v. *Hunt*, 5 Pick. 240

Digitized by Google

The defendant pleads that the legal title was in Farwell, and justifies as his lessee; but if he would rely on his title, he must set it out truly. He should have stated that Farwell held the estate in his capacity of executor. *St.* 1788, c. 51; *Smith* v. *Dyer*, 16 Mass. R. 18.

Merrick, for the defendant, cited *Parsons* v. *Welles*, 17 Mass. R. 419; *Perkins* v. *Pitts*, 11 Mass. R. 125.

Oct. 7th.

WILDE J. delivered the opinion of the Court. This is an action of trespass *quare clausum*, and the defendant pleads soil and freehold in one Levi Farwell; and the question is, whether the legal title was in him at the time of the supposed trespass. By the facts reported it appears, that the locus was part and parcel of a small farm, which had been before that time mortgaged to one Samuel Manning by one Samuel Wilder, under whom the plaintiff claims to hold; that Samuel Manning had died before the time of the supposed trespass, and that Farwell was his executor. The legal estate, therefore, was in him, and there is no evidence that it has ever been released; so that this action cannot be maintained, even if the mortgage has been paid off, as the plaintiff contends it has been. On the breach of the condition of the mortgage, the estate of the mortgagee became absolute at law, and although the mortgager, by payment afterwards of the mortgage debt at any time before foreclosure, would become entitled to a reconveyance, and might well recover his title and possession by a suit in equity, yet it is clear he cannot maintain trespass against the mortgagee or any one holding under his title. *Parsons* v. *Welles*, 17 Mass. R. 419. And it is equally clear, that actual payment of the mortgage has never been made and completed, although a greater part of the money due has been deposited in the hands of the executor, which he will be bound to appropriate towards the payment and discharge of the mortgage. But as matters now stand, the mortgage cannot be considered as paid; for it was agreed by the parties at the time the money was deposited, that it should not discharge the mortgage. On no ground therefore can this action be maintained.

It has been objected to the plea, that the defendant does not justify under Farwell, as executor; but this is not material;

Digitized by Google

Howe v. Lewis.

the legal estate was in him, and it was not necessary, in pleading, to allege in what capacity he held the estate.

Nonsuit to stand.

Thomas B. Townsend *versus* Daniel Newell.

The manufacturer of goods has a lien for the price of manufacturing them.

Where goods in the possession of a party who had a lien on them were attached, and he receipted for them to the officer, under an agreement that he should continue to retain for his lien; and afterwards they were attached at his own suit, and he receipted for them, still asserting his lien, it was *held* that the lien was not discharged.

These attachments having been made on writs against a person who was not the owner of the goods, and the general owner having brought replevin against the attaching officer, it was *held*, that although the attachments were void and the defendant could not justify as an officer, he might nevertheless defend the detention of the goods as the servant of the party having the lien.

In such action of replevin the defendant was permitted to prove by parol evidence, that the goods were attached by him subject to the lien, although no mention of the lien was made in the receipts taken by him nor in his returns.

Replevin, to recover a quantity of satinets, alleged to have been taken, attached and detained by the defendant, a deputy sheriff, at the manufactory of Willard Rice. The cause was tried before *Morton* J.

The defendant pleaded, 1. the general issue; and 2. that the property was in John Townsend. To this second plea the plaintiff replied property in himself, and issue was joined thereon. On these two issues the jury found in favor of the plaintiff.

The defendant pleaded, 3. that Rice had, previously to the supposed taking, performed divers labors and furnished divers materials in and about the manufacturing of the goods, and had thereby acquired a lien thereon as a manufacturer, and that the defendant, at the time of the supposed taking, and at the time of the service of the writ of replevin, had possession of the goods at the manufactory, as the servant of Rice and on his account.

The plaintiff replied, denying the performance of the labor and the furnishing of materials by Rice, and issue was joined thereon

Digitized by Google

Under the third plea, the plaintiff having offered a writ against John Townsend, in favor of one Charles, whereon was a general return of an attachment by the defendant, made May 4, 1832, of the satinets, the defendant offered evidence, which was objected to by the plaintiff, that at the time of the attachment, Rice, who had performed labor and furnished materials in the manufacture of the satinets, claimed to hold the same until his demand for materials and manufacturing should be paid, and refused to have the goods taken from his possession until his lien should be discharged; that it was then agreed between Rice, and the defendant, and the attaching creditor, that Rice should receipt to the defendant for the goods, and that he should go on and complete the manufacture of the cloths and retain them until the question of his right of lien upon them could be satisfactorily settled; and that Rice accordingly gave a receipt to the defendant, in the usual form of a receipt to an attaching officer, and finished the goods and had them in his custody when the writ of replevin was served.

It appeared that John Townsend was indebted to Rice to the amount of about $150, for manufacturing other cloths than those replevied, and that Rice sued out a writ against him, upon which the defendant attached the same satinets immediately after the writ in favor of Charles was served. The general claim in Rice's writ was large enough to cover all the demands which he had against John Townsend, including that for manufacturing the satinets in controversy.

It was testified by a witness offered by the defendant, that at the time when Rice went to procure his writ, he spoke of John Townsend's owing him for work done previously to the manufacturing of the satinets. This testimony was objected to by the plaintiff. No other evidence was offered, as to what claim Rice intended to include in his writ.

It was proved, that when the plaintiff came to replevy the goods, Rice forbid his taking them, because he had a claim upon them and had a right to retain them.

John Townsend, who was called as a witness by the plaintiff, testified that he received from the plaintiff the wool from which the goods replevied were manufactured; that he contracted with Rice to manufacture satinets at a certain price per

Digitized by Google

Townsend v. Newell.

yard, previously to his receiving the wool; that when the plaintiff furnished him with the wool, it was under a contract that he, the witness, should get it manufactured at a certain price per yard; and that he disclosed to the plaintiff, that he had made a contract to have it manufactured accordingly.

The jury, under the direction of the court, found that Rice did perform labor and furnish materials in manufacturing the satinets, as alleged in the third plea.

If the evidence offered by the defendant and objected to by the plaintiff was properly admitted, the verdict was to stand and a judgment of return to be rendered for the defendant; otherwise &c.

Oct. 4th.

Barton for the plaintiff. If in this country a manufacturer has a lien on the goods for the price of manufacturing them, yet where he secures himself by an express contract for the price, the law will not aid him by a lien, but he must resort to his contract for payment. 2 Dane's Abr. 264. Consequently Rice had no lien on the goods replevied.

But if he once had a lien, it was dissolved by the attachments. In the suit of Charles, he became the receipter for the goods; so that the defendant could not take them as the servant of Rice, but on the contrary, Rice received them as the servant of the defendant. Evidence that Rice continued to hold by virtue of his lien, with the defendant's assent, was inadmissible, because it contradicted the receipt given by him to the defendant. Further, Rice attached the goods on his own writ, and thus waived his lien. His writ must have included both of his demands, and he elected to look for his remedy to the general property of the debtor, instead of trusting to his lien.

Any evidence showing that the goods remained in the hands of Rice under the lien, was inadmissible, as it contradicted the officer's return, which sets forth generally an attachment of the goods as the property of John Townsend. The officer might have returned an attachment subject to the lien, if this had been intended; for the *St.* 1829, *c.* 124, provides expressly for such an attachment.

J. Davis and *Washburn*, *contrà*. The defendant resists this suit as the servant of Rice; if Rice himself had no right to

Digitized by Google

detain the goods, the defence fails; otherwise it is valid. The special agreement, as it merely fixed the price of manufacturing the goods, without giving a credit, did not prevent the accruing of a lien. *Chase* v. *Westmore*, 5 Maule & Selw. 183; 2 Kent's Comm. (1st edit.) 497; Yelv. (Metcalf's edit.) 67 *b*, 67 *f*. Rice therefore had a special property, and the goods were not subject to be replevied out of his hands, except upon payment of the price of manufacturing them. *Wheeler* v. *Train*, 3 Pick. 255. He has not waived his lien, unless that result follows by construction, from the service of the writs and the transactions between him and the officer. But the plaintiff is a stranger to those proceedings, and as against him, Rice and the officer may explain them by parol evidence, and show that there was no intention to waive or dissolve the lien. *Fuller* v. *Holden*, 4 Mass. R. 498; *Tyler* v. *Ulmer*, 12 Mass. R 163; *St.* 1829, *c.* 124; *Learned* v. *Bryant*, 13 Mass. R. 224. The demand secured by the lien does not appear to be included in the writ sued out by Rice, nor could it have been, for it was not due when the writ was served, the goods not having been finished.

Per Curiam. Three questions have been presented in the argument of this case; 1. Whether Rice had a lien; 2. if he ever had, whether it has been discharged; 3. and if not, whether the defendant can justify as his servant. Oct. 7th

1. The law is well settled, that, in general, where goods are delivered to be manufactured, the manufacturer has a lien on them for his labor and expense bestowed on them; and this is a very strong case, as Rice furnished materials, as well as labor, which constituted a large part of the value of the manufactured article. The circumstance of there being an express stipulation merely determining the price to be received by him, does not affect the lien.

2 Then was the lien dissolved? It appears that one Charles sued out a writ against John Townsend and attached the goods, and that Rice receipted for them to the officer. But Rice claimed a special property in them at the time, and it is manifest that he did not intend to give up any right, but that he agreed to receipt, retaining his lien. We think that the lien was not discharged by these proceedings. It is

Digitized by Google

Townsend v. Newell.

further objected, that Rice caused the goods to be attached on his own account, and again receipted for them It seems doubtful whether his writ was designed to cover both of his demands against John Townsend; but however this may be, it was clearly his intention to retain his lien, and we are satisfied that he did not discharge it by his attachment and receipt.

3. The only point remaining is, whether the defendant can justify retaining the goods as the servant of Rice. He was employed by Rice to attach them, but it turned out that the attachment could have no operation, because the general property was in Thomas B. Townsend, and not in John Townsend, the debtor. The defendant therefore cannot justify as an officer, and the question is, whether Rice can treat him as his servant, though he employed him as an officer to make a void attachment; and we are of opinion that under these circumstances the defendant may be regarded as the servant of Rice.

Judgment on the verdict and for a return.

AMARIAH TAFT *versus* WILLIAM C. AYLWIN.

The defendant being employed by the heirs of a deceased person, to collect the debts due to the estate of the deceased, one of the heirs, who was insolvent, drew an order for value received requesting the defendant to pay to the plaintiff whatever balance might come into the defendant's hands for account of the drawer, out of the estate of the deceased, and the defendant "accepted to pay the balance when received." In an action by the plaintiff upon the order, it was *held*, that the defendant had no right to retain a part of the money received, in discharge of any claim which he had against the drawer, beyond the expenses of collecting the money; and that whether the plaintiff, when he received the order, did or did not know of a claim set up by the defendant, which was discovered after the acceptance, was immaterial.

ASSUMPSIT upon an order, dated July 18, 1831, drawn by Alexander Peters in favor of the plaintiff, requesting the defendant to pay over to him $1700 or whatever balance of money there was in his hands, or might come to his hands, for account of the drawer, out of the estate of Joseph Peters, deceased; on which order the defendant wrote, "accepted to pay the balance when received. Wm. C. Aylwin."

Plea, the general issue.

At the trial, before *Morton* J., it appeared that Alexander

Digitized by Google

Peters was one of the heirs of Joseph Peters; that he, with the other heirs, employed the defendant to collect the money due to the deceased; that Alexander had, some years before, failed in business, and had not, at the date of the order, paid his debts; that on that day he brought to the defendant for his acceptance, an order in favor of the plaintiff, and desired the defendant to accept it, as he wished to place this fund where he could control it; for he could not, as he said, pay his old debts, but he wished to provide for some of his more recent creditors; that he owed the plaintiff several hundred dollars, but much less than his share in the estate of Joseph Peters; that the defendant stated to him that the order would not answer his purpose, as it ought to be for value received; that a new order was drawn in conformity with his directions, which was the order declared upon; that Coolidge, Deblois & Co., in 1819, recovered judgment against Alexander Peters for the sum of $155·73 and costs, which remained wholly unsatisfied; that in February 1820, Coolidge, Deblois & Co. assigned their property and demands of every kind to the defendant, and as such assignee he was entitled to the proceeds of the judgment above mentioned, at the time when the order was accepted; that at the time of the acceptance nothing was said about the judgment, but that the defendant addressed a letter to Alexander Peters, dated the 18th of July, 1831, but postmarked on the 29th of that month, stating that in looking over an old docket he had found the judgment in question, and expressing his desire to have part of the money to be collected, applied to the discharge of the judgment; that this letter was received by Peters at Mendon, and he soon thereafter made known to the plaintiff that he had received it, but it did not appear that he made known to him the contents; that in a short time after the acceptance of the order, the plaintiff executed an obligation, wherein he promised Peters to pay some of his creditors, which obligation the plaintiff retained in his hands and did not deliver to Peters for some months; that in the summer of 1832 the plaintiff paid about $200 to one Wood, and he has since paid over the balance to other creditors of Peters; that the defendant stated an account in which he credited himself with the amount of the judgment, on the back of which

Digitized by Google

Taft v. Aylwin.

account and on the original order the plaintiff signed duplicate receipts for money paid to him by the defendant in pursuance of the order, but the receipts do not refer to the account, nor did it appear that the plaintiff saw the account; that at the date of the last receipt the defendant had received all the money mentioned in his acceptance, and that on the same day the plaintiff demanded payment of the balance then due to him.

If upon these facts the plaintiff was entitled to recover, judgment was to be rendered in his favor for the amount retained by the defendant on account of the judgment recovered by Coolidge, Deblois & Co.; otherwise he was to become nonsuit.

Oct. 5th. *J. Davis* and *Washburn*, for the defendant, cited *Brackett* v. *Winslow*, 17 Mass. R. 160; *Barrett* v. *Barrett*, 8 Pick. 342; *Cole* v. *Trull*, 9 Pick. 328; *Hathaway* v. *Russell*, 16 Mass. R. 473.

Merrick and *Rawson*, for the plaintiff, cited *Grew* v. *Burdett*, 9 Pick. 265; Chit. Contr. 328; *Rogerson* v. *Ladbroke*, 1 Bingh. 93; *Houston* v. *Robertson*, 6 Taunt. 448; *Sargent* v. *Southgate*, 5 Pick. 312; *Mowry* v. *Todd*, 12 Mass. R. 281; *King* v. *Fowler*, 16 Mass. R. 397.

Oct. 7th. PUTNAM J. delivered the opinion of the Court. The question is, whether the defendant may be allowed to set off against his acceptance a judgment for $155·73 recovered in 1819 by Coolidge, Deblois & Co., and the interest, which judgment was assigned by them to the defendant in 1820, when they failed.

It is contended for the defendant, that the acceptance being special, viz. to pay the balance that should be in his hands, upon its face imported and notified the holder that the defendant was to deduct from the money he should receive, not only his account for services in the collection, but any legal or equitable claim that he had or might have against the drawer

The case finds that the drawer was entitled to a share of the estate of Joseph Peters deceased. The defendant was the agent of the heirs to collect the money belonging to the estate. Alexander Peters (the drawer) was then embarrassed with old debts, and he had also contracted debts recently

Digitized by Google

He represented to the defendant, that he was desirous to retain the control of his share of this property, saying expressly that he could not pay his old debts. His intent evidently was, to give a preference to some of his creditors over others. That was a legal right which he might exercise if he pleased. He frankly disclosed these views to the defendant, when the following mode of carrying them into effect was adopted. A negotiable bill was drawn, and accepted by the defendant, payable to the plaintiff or order, "for $1700 or whatever the balance of money that then was or should come to the hands of the defendant for account of Alexander Peters out of the estate of Joseph Peters deceased." And the defendant accepted the bill, to pay the balance when received.

The case finds that nothing was then said by the defendant to Alexander Peters about the judgment which the defendant now claims to have allowed. It was then more than ten years old, and would come within the description of the debts which the drawer thought and declared, he could not pay.

It is very clear that, if an action had been brought by or in the names of Coolidge, Deblois & Co., against Alexander Peters, and the defendant had been summoned as trustee, he could not have been held, after having accepted this negotiable bill or order.

And the plaintiff now contends, that if the defendant had informed Alexander Peters that this old judgment must be deducted, he would not have employed the defendant to aid in the proposed arrangement, but would have resorted to other means and to other counsel to effect his purpose.

If this suit were brought avowedly for the use of the drawer, Alexander Peters, to the intent that he should have the control of the funds, it seems to us to be clear that it would not be competent for the defendant to prevent him from appropriating the same as he should think just. But the payee of this bill is a holder for value received. He not only had claims against the drawer in his own right, but after this bill so accepted by the defendant came into his hands, he became under an obligation to discharge certain debts for the drawer, and he has actually paid the same. So that the payee comes not only with the legal presumption, but with the proof of having paid value for the bill.

Digitized by Google

Taft v. Aylwin.

It has been suggested for the defendant, that the plaintiff has given several receipts for money received of the defendant on account of this bill, upon the account stated by the defendant, in which the judgment of Coolidge, Deblois & Co., is charged against the funds; and so that it may be fairly presumed that the plaintiff has assented to the correctness of that charge.

But upon an examination of the original account stated and the receipts of the plaintiff, we do not think that this suggestion is well founded. The receipts do not refer to the account. It does not appear that the plaintiff saw the account. The receipts are on the last page of the paper, on which there is no other writing. The receipts are for money received "in pursuance of the order of Alexander Peters, dated &c;" and duplicate receipts were signed by the plaintiff, one set of which were written on the back of the original order.

It has been contended for the defendant, that on the same day, but after he accepted the order, he discovered the mistake in not claiming the judgment to be allowed for the creditors of Coolidge, Deblois & Co., and notified the drawer by a letter of that date, but postmarked several days afterwards, that some arrangement should be made in that respect. Peters, the drawer, received that letter, but the case finds that it did not appear that he communicated the contents to the plaintiff. But if he had, it seems to us that it came too late. The rights of the parties had become fixed by the order and acceptance. The balance mentioned in the order refers expressly to the sum that should remain in the defendant's hands, which should belong to Alexander Peters, after the collection of the funds of the estate of Joseph Peters. The defendant engaged that Alexander Peters should have the control of that balance, and that it should be paid to the plaintiff or to his order. We are very clearly of opinion, that the defendant cannot be permitted to claim any part of those funds as assignee of the house of Coolidge, Deblois & Co., whether the assignment should have been for the use of the creditors of that house, or for his own use.

In every view in which this case has been presented to our minds, we are all of opinion that the judgment must be for the plaintiff

Digitized by Google

JOHN WILSON *et al. versus* AUSTIN BROOKS.

Where a person who had been supported by his town as a pauper, had bodily health and strength, though of small mental capacity, and was able to earn more than enough to support himself, and had found an employer, it was *held* that he was no longer a pauper; and consequently, where the town made a contract with the plaintiffs that they should take care of all the paupers belonging to the town, and be entitled to their services, it was *held* that they were not entitled to the services of the person above described.

IN the Court of Common Pleas the parties stated the following facts.

On April 3, 1829, the defendant, by virtue of a contract previously made with the town of Petersham, took the care and custody of the poor of the town for the term of three years then next ensuing. Isaac Bragg, for whose services this action was brought, was received by the defendant, on that day, as one of the poor of the town, under this contract. Soon afterward, at the request and by the direction of the defendant, Bragg went to live with him at his house, about one mile from the poor farm, and continued in his family during the time that the defendant had the care of the poor, laboring for him on his, the defendant's farm, and on the poor farm.

At the expiration of the term of three years, Bragg expressed a determination not to leave the defendant, unless compelled to, and the defendant was willing to let him remain with him, and to pay him wages for his services over and above all expenses of boarding, clothing and nursing him; and the defendant offered to do so, and to give bond to the town that Bragg should not become chargeable to the town for a period of ten years. This was done after a contract, dated January 3, 1832, had been made by the town with the plaintiffs.

By this last contract the plaintiffs are to support comfortably and decently, in sickness and in health, all the paupers who shall be chargeable upon the town on April 3, 1832, and within three years thereafter, for and during the full term of three years from and after that day; and are to have the reasonable service and labor of the paupers.

Bragg remained with the defendant and labored for him during the time specified in the plaintiffs' declaration. It

Digitized by Google

Wilson v. Brooks.

was agreed that he was a person of small mental capacity, and that he might be regarded as *non compos mentis;* but that he possessed good health and strength, and was capable of doing many kinds of work upon a farm, and of earning by his labor more than enough to support himself. He had been for fifteen years previous a pauper of the town of Petersham, and no change in his condition had taken place.

About the 1st of May, 1832, the plaintiffs asked the defendant if he would deliver up Bragg, and the defendant replied that he would not. The plaintiffs then said that they should look to him for payment for Bragg's services, at the rate of two shillings a day.

Williams, J. of C. C. P., decided that the plaintiffs were not entitled to maintain the action and ordered judgment to be entered for the defendant; and thereupon the plaintiffs filed exceptions.

Oct. 5th *Merrick* and *Houghton* for the plaintiffs.

Brooks for the defendant.

Oct. 7th. MORTON J. delivered the opinion of the Court. In this action the plaintiffs claim to recover of the defendant compensation for services performed for him by one Bragg. They found their claim upon a contract between them and the town of Petersham. By this contract the plaintiffs were, for a certain term, to have the care and custody of all the paupers belonging to the town, and to receive all the labor and services which could reasonably be required of them.

The real question in this case turns upon the true construction of the contract. No paupers were named in it. Is Bragg included within the general description used? There is no legal objection to the validity of the contract. It seems to be a reasonable and a proper one. But it manifestly does not come under the sixth section of *St.* 1793, *c.* 59, nor is there any reason to suppose that it was intended to be made in pursuance of the authority therein given. That section authorizes overseers to bind out to service, by deed, for a term not exceeding one year, certain classes of persons therein described, although not actually chargeable to their town at the time. This is an important and delicate, if not dangerous, discretionary power, trenching closely upon personal rights, and

Digitized by Google

one which ought to be exercised cautiously, sparingly, and in exact accordance with the provisions of the statute. The plaintiffs cannot claim to hold Bragg to service by any deed made in pursuance of this clause. If they can establish a right to his services, it must be under their general contract with the town, and because he was a pauper when that contract went into operation, and continued to be such during the time for which they claim his services.

Towns are bound by law to support, comfortably, all such of their inhabitants as may from time to time fall into distress and stand in need of relief, and to continue such support so long as it may be needed; and during its continuance they are entitled to the reasonable services of those supported by them. It is no part of their duty to support their paupers in idleness. This would make a system, now of questionable utility, highly deleterious in its effects and influence. But each one, in whatever situation he may be, is bound to contribute his services, according to his ability, towards his own support and that of his family, if he have one. These duties can only be performed by agents, to whom towns may, for limited periods, grant the rights and powers enjoyed by themselves The rights and duties of towns and paupers are correlative. While the town supports the pauper, the pauper is bound to labor for the town. But when the support becomes unnecessary, the right to control the labor ceases. It may happen that a pauper, by the acquisition of property by gift, devise or descent, may be raised from poverty and dependence. In such case can it be pretended that he may be retained the unwilling tenant of an almshouse, and be compelled to labor for whomsoever the town or its agent may direct? The town, by *St.* 1817, *c.* 186, § 5, may claim a reimbursement for the support furnished, but can have no further legal claim to his services. And agreements made by towns with agents or contractors relative to the support of paupers, must be construed according to these principles.

Is Bragg, during any portion of the time mentioned in the plaintiffs' writ, to be deemed a pauper? Was he actually chargeable to the town; or did he stand in need of immediate relief? If so, he comes within the terms of the

Digitized by Google

Wilson v. Brooks.

contract; the plaintiffs were entitled to his services, and ought now to recover compensation for them.

The state of his mental powers need not now be inquired into, for it can have very little bearing upon the question under consideration. Although of weak mind, small mental capacity, and regarded as *non compos mentis*, yet he was not under guardianship, and might make contracts for necessaries, and for such purposes dispose of his own services, unless they were due to the town. He had been treated as a pauper, and labored for the town many, perhaps too many, years. But he had bodily health and strength; could perform many kinds of labor on a farm; and was able to earn more than enough to support himself. He was willing to labor for the defendant, and the defendant was willing to employ and to pay him wages, besides supplying him with all necessary food and clothing. Can such a person be considered a pauper? We think not.

Whether by reason of his improvidence or incapacity, the overseers might bind him to service, by deed under the 6th section of *St.* 1793, *c.* 59, or not, it is not proper to consider. We have not the facts necessary to enable us to determine the question. But not being a pauper, he is not included in the plaintiffs' contract, and the care and custody of his person, or the right to his services, did not vest in the plaintiffs.

Judgment of C. C. P. affirmed.

Digitized by Google

JOHN JENNISON *versus* HUTCHINS HAPGOOD *et al.*
PRUDENCE SAUNDERSON *versus* The Same.
THOMAS GROUT *et al. versus* The Same.

Where a bill in equity brought by the administrator and heirs of an intestate to recover and devised to him, was discontinued, and an execution against them for the costs was paid by a stranger, and not by the administrator nor at his request, it was *held* that a charge for such costs in the administrator's account, was properly disallowed by the judge of probate.

Where an executor sold the real estate of the testator and purchased it himself, and the heirs of the devisee, whose estate was insolvent, affirmed the sale, and in consequence the proceeds and interest thereon were paid to the administrator of the devisee, it was *held*, that the proceeds were to be treated as personal estate from the time of the sale, and that the heirs therefore had no right to the interest as a substitute for the rents and profits of the real estate, but that the devisee's creditors were entitled as well to the interest as to the principal.

Where a testator, having mortgaged his real estate, devised it to his son, who died leaving a widow, and the executor sold the equity of redemption and purchased it himself and redeemed the mortgage, paying one half of it with assets in his hands, as executor, as directed in the will, and the other half with his own money, and the heirs and widow of the son elected to affirm the sale, it was *held*, that the widow was entitled, on account of her right of dower, to the interest during her life on one third of the sum for which the equity of redemption was sold, and on one third of the amount paid out of the testator's estate towards extinguishing the mortgage.

THESE cases were appeals from a decree of the judge of probate, made in January, 1833, ordering distribution to be made of the estate of John Grout deceased.

The parties agree, that at September term 1828 of the Supreme Judicial Court, a bill in equity which had been prosecuted by John Jennison the administrator, by Prudence Grout, now Prudence Saunderson, the widow, and by Thomas Grout and others, the children and heirs at law, of John Grout, against Hutchins Hapgood, executor of the will of Jonathan Grout, the father of John, for the recovery of a certain farm devised by Jonathan to John Grout, was dismissed, and that thereupon judgment was rendered that Hapgood should recover $293, costs of suit, against those plaintiffs, for which sum execution was accordingly issued. This execution was afterwards paid by one Saunderson. At the time of settling his final account as administrator, Jennison claimed to be allowed the amount of this judgment for costs, or some part of it, but the judge of probate refused to allow the same. Saun-

Digitized by Google

Jennison v. Hapgood.

derson had been the guardian of John Grout's children, but at the time of the judgment they were all of age. There is no proof that Jennison requested Saunderson to pay the judgment, but Saunderson then held an agreement signed by the children, dated in February, 1826, when two of them were minors, in which they promised to reimburse his expenses in the prosecution of the suit in equity. No request from any other person to Saunderson to pay the judgment was proved; but in a conversation had soon after the judgment, between Saunderson and Lewis Bigelow, the solicitor for the plaintiffs in the bill in equity, Bigelow told Saunderson that it would not do to have the execution go out against Jennison, and thereupon Saunderson paid it.

The devise of the farm was as follows. "I give unto my son John my homestead farm &c., together with two bonds wherein my son Jonathan promises to indemnify me against a certain mortgage of said farm to Abigail Hale, &c., and should Jonathan be unable to pay the sums named in his obligations to me, I order that John pay the one half the deficiency, and the other half shall be paid out of my other estate," &c. "The residue of my estate I give, after paying my debts, to my daughters, &c., always providing that if the residue shall exceed one thousand dollars in value, to each daughter, the overplus shall be divided among all my children, after firstly taking from such overplus enough to clear the homestead for John." The testator died on the 9th, and John Grout on the 12th of September, 1807.

Hapgood, as executor, sold the right in equity to redeem the farm, for $500, and it was bid in for him by an agent. In 1809 he redeemed the farm, and has ever since owned it. The conveyance to him by Mrs. Hale was in the form of an assignment of the mortgage. Mrs. Hale entered under the mortgage, for condition broken; and she and Hapgood held peaceable possession of the farm for more than three years after such entry.

In the course of the settlement of Jonathan's estate, this Court decided, that those who were interested in his real estate, which had been sold by the executor and purchased in by himself, might elect to take the real estate thus sold, or the

Digitized by Google

proceeds of the sale. The widow and heirs of John elected to receive the proceeds of the sale; which election was made at or about the time of dismissing the bill in equity.

In the case of *Grout* v. *Hapgood*, 13 Pick. 159, it was considered that one half of the incumbrance was to be paid out of the testator's estate, but that the provision for paying the other half out of the "overplus" of the "residue," had been defeated by events; and it was decreed that Hapgood should pay to the administrator of John Grout the proceeds of the real estate devised to John, with interest, including half of the amount of the mortgage.

After that decree, which was made in October, 1832, and before January, 1833, the widow of John demanded of the administrator, that he should pay over to her one third part of the income of the estate which had come into his hands as the proceeds of the real estate.

The children of John claimed of the administrator the interest upon the sums of money which had come into his hands, from the death of their father. The estate of John was represented insolvent, and was actually so.

The judge of probate decreed, that the account presented by the administrator be allowed, first deducting the charge for payment to Hapgood of $293, &c., and that the balance in his hands, of $2585, be paid over to the creditors of the estate, whose claims had been allowed.

From this decree the administrator appealed, because he was not allowed to retain for the sum of $293, above mentioned.

The heirs appealed, because the balance in the hands of the administrator having been the proceeds of the rents and the sales of certain real estate of the intestate, and the interest thereon, the interest on the amount of such sales, from the time of making thereof, together with the rents of said real estate, ought to have been decreed unto the heirs.

The widow appealed, because the balance was made up of the proceeds of sales of real estate of the intestate, and the income of one third part thereof ought to have been decreed to her during her life, as and for her lawful dower out of the estate of the intestate.

Digitized by Google

Jennison v. Hapgood.

The records of the proceedings in the settlement of the estate of Jonathan Grout were made a part of the case. See *Jennison* v. *Hapgood*, 7 Pick. 1, and 10 Pick. 77; *Houghton* v. *Hapgood*, 13 Pick. 154; and *Grout* v. *Hapgood*, 13 Pick 159.

1841. 5th.

J. Davis and *Washburn* for the appellants. The bill in equity against Hapgood was brought and prosecuted for the benefit of the estate of John Grout generally, and not for the particular benefit of the heirs; the costs of the suit therefore were a proper charge upon the estate. The administrator was personally liable on the execution, and the payment made by Saunderson, under the direction of Bigelow, who was counsel for the administrator, must be deemed to have been made by him as the agent of the administrator and at his request.

In regard to the appeal by the widow, it appears that Jonathan Grout, having mortgaged his homestead farm to Mrs. Hale, devised the equity of redemption to his son John, and directed that one half of the mortgage should be paid out of his, the testator's, estate. Hapgood, the executor, sold the equity of redemption for $500 and purchased it himself, and redeemed the mortgage, paying one half of it with funds which he held as executor. The widow of John Grout was dowable of the equity of redemption, but as she and the heirs of John have elected to take the proceeds of the land instead of the land itself, she is entitled, during her life, to the interest on one third of $500, for which the equity of redemption was sold, and on one third of the amount paid by Hapgood as executor towards the redemption of the mortgage. *Hildreth* v. *Jones*, 13 Mass. R. 525; *Jennison* v. *Hapgood*, 10 Pick 91, 102; *Gibson* v. *Crehore*, 5 Pick. 146; *Bolton* v. *Ballard*, 13 Mass. R. 227.

The heirs having elected to affirm the sales, the proceeds are to be treated as real estate, and until the principal is applied to the payment of John's debts, the heirs are entitled to the interest, as they would have been entitled to the rents and profits of the real estate until it should have been sold for the payment of debts. *Gibson* v. *Farley*, 16 Mass. R. 280.

Brooks for the appellees. Supposing that the widow was entitled to dower, she ought to have made her claim when the

Digitized by Google

subject of the distribution of the balance in the hands of Hapgood as executor of Jonathan Grout was before the probate court. The heirs of John required that his share should be paid to them; but the judge decreed that it should go to John's administrator. The heirs appealed, but the decree was affirmed by this Court. *Grout* v. *Hapgood*, 13 Pick. 159. The widow did not appeal, and the question therefore of her right to dower, is *res judicata*. [*Wilde* J. But the administrator received John's distributive share as trustee for all persons interested in John's estate.]

But the widow had no right to dower. She might have paid off the whole of the mortgage and thereby entitled herself to dower, according to the case of *Gibson* v. *Crehore*, but she has not done so; and Hapgood, the executor, had not assets sufficient to discharge the mortgage, before it was foreclosed. He was not bound to advance his own money to redeem, and instead of redeeming he took an assignment of the mortgage, and the land is now lost to the widow entirely. It is argued that she had a right of dower, and that by her election it is turned into money. But she never had a right of election. As she did not redeem, she had no interest in the real estate, and consequently the executor sold and bought no interest belonging to her. If the mortgage is considered as yet open, she may now entitle herself to dower by redeeming; but if the mortgage has been redeemed in such manner that she can avail herself of the redemption, she is entitled to dower in the land itself.

Oct. 8.

WILDE J. delivered the opinion of the Court. Several parties have appealed from the decree of the judge of probate ordering distribution to be made of the estate of John Grout deceased, and several distinct questions are raised on their respective claims.

At the hearing before the judge of probate, John Jennison, the administrator on the estate of John Grout, claimed to be allowed the amount of a bill of costs recovered against him and the heirs of John Grout, in a suit in equity in which they, the administrator, and heirs, were plaintiffs, and Hutchins Hapgood was defendant. This claim was disallowed by the judge of probate, and his decision on this point is manifestly well

Digitized by Google

Jennison v. Hapgood.

founded. The administrator has never paid any part of this bill of costs; it was paid by one Saunderson; so that if there were any claim which ought to be allowed, it would only be to the extent of the administrator's liability to contribution. Mere liability, however, would not authorize an allowance, unless it might be presumed that the liability would be enforced; as to which we give no opinion, because we think that the administrator is not liable to contribution. Saunderson paid the money voluntarily, not at the request of the administrator, but with the understanding that he was not to be held responsible. Saunderson was informed by Mr. Bigelow before he paid the costs, that it would not do to have the execution go out against the administrator. The suit was commenced for the benefit of the heirs, and the costs were paid on their account undoubtedly; whether at their request or not, does not appear; nor is it material, in considering this case, to ascertain that fact.

As to the claim of the heirs, we are of opinion that that also ought not to be allowed. John Grout's estate being insolvent, the claim of his creditors is paramount to that of his heirs. And there is no distinction between the principal sum arising from the sale of the farm by the executor of the will of Jonathan Grout, and the interest which has accrued thereon. The whole has been paid together to the administrator of John Grout's estate, and he holds it in trust for the creditors.

The remaining claim in behalf of the widow stands on a different footing, and ought to be allowed.

She had a right of dower in the equity of redemption, and when the mortgage was paid off, her right was thereby enlarged. This estate was sold by the administrator of Jonathan Grout's estate, and was purchased in for him; and it has been decided in another case, that this sale was not merely void, but voidable only, and that those interested in the estate might elect to avoid the sale, or to confirm it, and to look to the proceeds of sale as a substitute. In pursuance of this decision the widow elected to confirm the sale so far as she was interested, and she is bound by that election and is estopped to claim her dower in the land. It has been contended that the mortgage has been foreclosed by the entry of Mrs. Hale the mortgagee

Digitized by Google

and by her peaceable possession, and that of Hutchins Hapgood, for more than three years. This has been virtually decided to the contrary heretofore, on a full consideration of all the facts having any bearing on the question. The Court could not decide that the parties interested in this estate might elect to avoid the sale of the equity by Hapgood, if he had foreclosed the mortgage, and thereby obtained a valid title as assignee of the mortgage. This was decided in the case of *Houghton* v. *Hapgood*, and it is no longer an open question, and if it were, it is very clear that Hapgood, being as executor of the will of Jonathan Grout bound to redeem the mortgage, could not foreclose it against the devisees and persons interested in the estate under his will. And besides, in the case stated it is expressly agreed that Hapgood *redeemed* the mortgage.

The decree of the judge of probate therefore must be reversed and corrected so far as to admit the claim of Prudence Saunderson, the amount of which is to be computed by the tables and paid over to her, and the residue to the creditors of John Grout according to the original decree.

At October term 1834, the question of the widow's right of dower came before the Court again, upon a suggestion that she had not made an election to take the proceeds of the real estate, as above stated; and *Brooks* insisted that Hapgood had no assets to redeem, and that as the widow had not redeemed, she was not entitled to dower. But *Shaw* C. J. said that this argument had the same force against the creditors of John Grout as against the widow, for neither did they redeem; that it was applicable to a former stage of the proceedings; that the question now was only as to the distribution of a sum of money paid to the administrator of John Grout upon the ground that the executor of Jonathan had redeemed the mortgage. And in regard to the election of the widow, the Court thought that there was no error in the statement of facts at the former argument, but that this was immaterial, for she might now make the election; and the decision made in October, 1833, was confirmed.

Digitized by Google

JOHN D. GODDARD *versus* ASAHEL JOHNSON, Executor of William Johnson.

A bequest of a sum of money to be paid in three years from and after the testator's decease, is a vested legacy.

A husband may sue in his own right, after the death of his wife, for a legacy accruing to the wife during the coverture.

THIS action was submitted to the decision of the Court upon a statement of facts.

William Johnson, on May 6, 1816, made his last will, containing this clause: — "To my granddaughters Zeriah Johnson and Sally Johnson, twin daughters of my son Samuel Johnson deceased, I give 600 dollars, to be equally divided between them, and to be paid in three years from and after my decease." The testator died on June 14, 1830. His will was proved and allowed on July 6, 1830, and on the same day the defendant, as executor, gave bond to the judge of probate for the payment of the debts of the deceased and of the legacies given by the will. Sally married the plaintiff before the death of the testator. On March 14, 1833, she died, leaving one child. No administrator was appointed on her estate, nor had a guardian been appointed to the child. The plaintiff, after the expiration of three years from the death of the testator, and before the commencement of this suit, demanded of the defendant the legacy bequeathed to Sally, and this suit was brought to recover it.

Oct. 5th. *J. Davis* and *Washburn* argued, that the legacy was a chose in action which accrued during the coverture, and so vested in the husband, and therefore the action was properly brought by him in his own right. *St.* 1805, *c.* 90, § 2; Toller, (4th edit.) 220, 225; Com. Dig. *Baron and Feme*, *E*, 3; *Shuttlesworth* v. *Noyes*, 8 Mass. R. 229; *Clapp* v. *Stoughton*, 10 Pick. 469; *Fitch* v. *Ayer*, 2 Connect. R. 143.

Peters, for the defendant, contended that the legacy lapsed by the death of the wife before it became payable; 2 Dane's Abr. 243, 244; *Prowse* v. *Abingdon*, 1 Atk. 486; *Chandos* v. *Talbot*, 2 P. Wms. (5th edit.) 611, 612, 613, and note; *Pearce* v. *Loman*, 3 Ves. jun. 138; *Harrison* v. *Naylor*, 3 Bro. C. C. 108.

Digitized by Google

Goddard v. Johnson.

Admitting that it did not lapse, the wife, had she been living, must have been joined in the action, and being deceased, it should have been brought by an administrator on her estate. *Pattee* v. *Harrington*, 11 Pick. 221; *Whitaker* v. *Whitaker*, 6 Johns. R. 112.

Oct. 7th.

Per Curiam. It is exceedingly clear, that this was a vested legacy.

We think the husband might have sued alone, had the wife been still living, and consequently that this action may be sustained. It is a well settled principle, that a chose in action accruing to husband and wife during the coverture, vests absolutely in the husband.

Defendant defaulted.

Aaron Thomas *versus* Phineas Davis.

Assumpsit on the following writing, signed by the defendant and addressed to the plaintiff: "July 4, 1818. Sir, My son F wishes to have you lend him about $ 180. If you will let him have it, when you find his security not good, please to notify me, and I will account to you for the same." About July 4, 1818, the plaintiff lent to F $ 188, and received his promissory note payable on demand with interest. On January 12, 1829, F failed, and mortgaged his property to the defendant, to secure a demand due to him from F. Subsequently the defendant, without receiving any portion of his demand, released the property for the benefit of the other creditors of F. The interest on the promissory note was paid until 1830, when a part of the principal was paid and a new note was given by F for the balance. On December 4, 1832, the plaintiff notified to the defendant, that the security of F was not good, and requested him to pay the amount remaining due on the new note; the plaintiff having never given notice to the defendant of the existence of this debt, previously to that time. It was *held*, that the defendant was discharged from his liability on the writing signed by him.

Assumpsit. Upon a case stated it appeared, that the action was brought on the following writing, which was addressed to the plaintiff: "Northborough, July 4th, 1818. Sir, My son Francis wishes to have you lend him about one hundred and eighty dollars. If you will let him have it, when you find his security not good, please to notify me, and I will account to you for the same. Phineas Davis." About July 4, 1818, the plaintiff lent to Francis the sum of $ 188, and received his promissory note for that amount, payable on demand with

Digitized by Google

Thomas v. Davis.

interest, but dated February 16, 1818. Francis carried on an extensive business in West Boylston, where the plaintiff resided, and remained in good credit until January 12, 1829, when he failed and mortgaged his real and personal estate to the defendant and Isaac Davis, to secure their claims against him, to the amount of between $4000 and $5000. The failure of Francis was known to both the parties to this action at the time when it occurred. The defendant and Isaac Davis subsequently, without receiving any part of their claims, released the mortgaged property for the benefit of the other creditors of Francis. The interest on the promissory note was paid from time to time until the year 1830, but none of the principal was paid. On March 19, 1830, the plaintiff and Francis made a settlement of their mutual demands, excepting therefrom the promissory note, and a balance of $20·32 was found to be due from the plaintiff, which sum was deducted from the note, and a new note for the balance, $167·68, payable on demand with interest, dated February 16, 1818, was substituted for the original note; and interest was indorsed on the new note up to March 19, 1830. Some small payments on it were subsequently made. On December 4, 1832, the plaintiff notified to the defendant, that the security of Francis was not good, and requested him to pay the amount due on the new note; and there was no evidence that the plaintiff had ever notified to the defendant the existence of the debt previously to that time. The defendant lived about fourteen miles from the residence of the plaintiff.

It was also admitted, if the Court should deem evidence o it to be competent, that the plaintiff, on December 20, 1819, lent to Francis $100, which had been since paid.

If the Court should be of opinion, that this action could be maintained, then judgment was to be rendered for the plaintiff, for the amount of the new note, $167·68, with interest and costs; otherwise the plaintiff was to become nonsuit and the defendant to recover his costs.

Oct 7th.

C. Allen, for the plaintiff, cited *Hunt* v. *Bridgham*, 2 Pick. 581; *Frye* v. *Barker*, 4 Pick. 382.

Isaac Davis, for the defendant, cited *Stafford* v. *Low*, 16 Johns. R. 67; *Beekman* v. *Hale*, 17 Johns. R. 134; *Lanuse*

Digitized by Google

v. *Barker*, 3 Wheat. 148, note; *M'Iver* v. *Richardson*, 1 Maule & Selw. 557; *Russell* v. *Clark*, 7 Cranch, 69; *Oxford Bank* v. *Haynes*, 8 Pick. 423; *Gibbs* v. *Cannon*, 9 Serg. & R. 202; *Philips* v. *Aston*, 2 Taunt. 206; *Bank of New York* v. *Livingston*, 2 Johns. Cas. 410; *People* v. *Jansen*, 7 Johns. R. 332; *Law* v. *The East India Company*, 4 Ves. 833; *Codman* v. *Rogers*, 10 Pick. 112; *Duval* v. *Trask*, 12 Mass. R. 154.

Oct 7th.

WILDE J. delivered the opinion of the Court. Independently of the question of usury, it is very clear that this action cannot be maintained. After the failure of Francis Davis, the defendant was entitled to seasonable notice, that the plaintiff looked to him for payment. If this notice had been given, the defendant had ample means of indemnity out of the property assigned to him and Isaac Davis by Francis. This property has been since released for the benefit of other creditors of Francis, of whom the plaintiff is one. It was more than fourteen years after the loan to Francis, before the plaintiff gave any notice to the defendant, that he did not consider his security good, and it was nearly three years after Francis's failure. In the mean time the plaintiff received the interest from year to year, and a part of the principal, taking a new note for the balance. These facts show gross negligence on the part of the plaintiff, if he meant to call on the defendant for payment, and are abundantly sufficient in law to discharge the defendant from his conditional liability.

Plaintiff nonsuit.

Digitized by Google

JOEL PIERCE *versus* ABEL BENJAMIN.

Where at a sale of goods for the non-payment of taxes, the collector of taxes became himself the purchaser, it was *held*, that such sale was voidable, at the election of the owner of the goods.

It seems, that the owner in such case, in order to maintain trover for the goods, must elect to annul the sale, before the commencement of the action.

If a distress for non-payment of taxes be sold by the collector after the expiration of the time limited by *St.* 1785, *c.* 70, § 2, and *St.* 1791, *c.* 22, § 2, for making such sale, the delay renders the collector a trespasser *ab initio*; and trover will lie against him, in favor of the owner of the goods sold, although no demand thereof be made before the commencement of the action, the tortious taking of personal property being a conversion.

In such an action it appeared, that the collector applied the proceeds of the sale, in part-payment of the tax, and that the owner subsequently paid him the residue of and required a receipt for the whole amount of the tax, in order that he might settle with his landlord. *Held*, that this was not a waiver of the right to bring the action.

In such action it was *held*, that the measure of damages was the value of the goods, deducting the amount applied by the collector to the payment of the tax.

TROVER for a sleigh. The defendant pleaded the general issue.

At the trial, before *Wilde* J., it was proved by the plaintiff, that he demanded the sleigh of the defendant, on July 26, 1831, which was subsequent to the date of the writ, and while it was in the officer's hands for service; but that the defendant refused to deliver the sleigh.

The defendant proved, that in 1830, the plaintiff was an inhabitant of Montague; that he was assessed by the assessors of that town, for town, county and state taxes, in the sum of $7·52; that the defendant was a collector of taxes in that town; that about June 4, 1830, the tax lists, with warrants, were committed to the defendant; that about the 1st of November, 1830, the plaintiff removed from Montague to Sutton, without having paid the tax assessed upon him; that the defendant thereupon seized the sleigh, advertised it a week or longer, as for sale by auction, and purchased it at the auction for the sum of $5·00, he being the highest bidder; that the auction was held at a private house, on a town road, about one hundred rods distant from any public, travelled way, and three persons only were present; that the defendant, after deducting from the proceeds the expenses of the sale, amounting to 74 cents, applied the balance, amounting to the sum of

Digitized by Google

$4·26, in part-payment of the tax; that in June. 1831, the plaintiff came to Montague, paid the residue of the tax, and required the defendant to give him a receipt for the whole amount of the tax, in order that the plaintiff might settle with his landlord; and that the defendant accordingly gave such a receipt.

Upon this evidence it was objected by the plaintiff, that the sale was illegal; and it was so ruled by the judge. The defendant contended, that the payment of the residue of the tax and taking a receipt for the whole amount of the tax, was a waiver of all objections to the legality of the defendant's proceedings in the sale; but the judge ruled otherwise.

It was then insisted, on the part of the defendant, that the application of the sum of $4·26, in part-payment of the tax, by the defendant, ought to be taken into consideration by the jury in the assessment of damages; but that question was reserved for the consideration of the whole Court, and the cause was committed to the jury, for the purpose of determining the value of the sleigh. The jury returned a verdict for the plaintiff, and assessed damages in the sum of $22·04.

The verdict was to be amended, or set aside and a new trial granted, as the whole Court should determine upon these facts.

The case was argued in writing.

Newton and *Smith* for the defendant. This action is not maintainable, because there was no proof of a conversion before the commencement of the action, the demand and refusal being subsequent to the date of the writ. *Storm* v. *Livingston*, 6 Johns. R. 44; *Ford* v. *Phillips*, 1 Pick. 202; *Badger* v. *Phinney*, 15 Mass. R. 359; *Cheetham* v. *Lewis*, 3 Johns. R. 42. The sale was not a conversion; it was, at the most, voidable, not void. *Jennison* v. *Hapgood*, 7 Pick. 8; *Jackson* v. *Walsh*, 14 Johns. R. 407. It could not have relation back, and render the original taking tortious.

2. The plaintiff has misconceived his action; he should have brought a special action on the case. *Livermore* v. *Bagley*, 3 Mass. R. 487. It is a well established principle of law, that no one can maintain trover, unless at the time when the action was commenced, he had either the general or a spe-

Digitized by Google

Pierce v. Benjamin.

cial property in the chattels for the conversion of which the action is brought. *Waterman* v. *Robinson*, 5 Mass. R. 303; *Ludden* v. *Leavitt*, 9 Mass. R. 104; *Warren* v. *Leland*, 9 Mass. R. 265; *Commonwealth* v. *Morse*, 14 Mass. R. 217 The plaintiff had neither. The defendant took the sleigh by virtue of legal process; and until the sale, the special property was in the defendant, and the general property in the plaintiff. But when the sale took place, the general property of the plaintiff was divested. *Jennison* v. *Hapgood*, 7 Pick. 8 *Jackson* v. *Walsh*, 14 Johns. R. 407. It might be, supposing the rule in equity, forbidding a trustee to purchase the trust estate, to be applicable, that, after the sale, the plaintiff, as cestui que trust, had some equitable interest in the property; but he had no legal interest till a court of equity should have decreed the sale to be void. The bringing of this action is an affirmance of the sale. *Sheldon* v. *Sheldon*, 13 Johns. R. 220.

But the sale was not even voidable. The rule in equity is not applicable to cases like the present. *Sheldon* v. *Sheldon*, 13 Johns. R. 220. The defendant substantially pursued the course pointed out by *St.* 1785, *c.* 70, § 2, and *St.* 1791, *c.* 22, § 2. If he kept the sleigh longer than the time prescribed by those statutes, the plaintiff would have no cause to complain, even if the creditors of the plaintiff might impeach the sale on that ground; for the plaintiff had a better opportunity to pay the tax, and prevent the sale. *Haynes* v. *Wallis*, 6 Pick. 462.

The plaintiff, by paying the residue of the tax in June, 1831, and taking a receipt in full from the defendant, has waived his right to bring an action in order to avoid the sale.

If the plaintiff is entitled to recover, it is clear that the sum of $4·26, the proceeds of the sale, should be deducted from the amount of the verdict. *Sheldon* v. *Sheldon*, 13 Johns. R. 220; *Prescott* v. *Wright*, 6 Mass. R. 20; *Sandford* v. *Nichols*, 13 Mass. R. 286; *Caldwell* v. *Eaton*, 5 Mass. R. 404.

Merrick and *Sibley*, for the plaintiff. The gross delay of the defendant in making the sale, and his proceedings at the sale, rendered him a trespasser *ab initio*. *Purrington* v. *Loring*, 7 Mass. R. 388; *Nelson* v. *Merriam*, 4 Pick. 249. The

Digitized by Google

original taking of the goods, being therefore tortious, was a conversion of them. Where trespass will lie for a wrongful taking, trover will lie also. 1 Chitty on Pl. 153; *Farrington* v. *Payne*, 15 Johns. R. 431; *Prescott* v. *Wright*, 6 Mass. R. 20; *Wallis* v. *Truesdell*, 6 Pick. 455; 2 Selwyn's N P. 1071.

The jury found, as damages, the value of the property at the time of the conversion. We contend, that this is the legal measure of damages, and that nothing like a set-off is to be allowed in this action. *Kennedy* v. *Whitwell*, 4 Pick. 466.

Oct. 7th.

MORTON J. delivered the opinion of the Court. The defendant, who was collector of taxes in the town of Montague, justifies the taking of the goods in question under a warrant from the assessors of that town and a seizure and sale of the same for the payment of the plaintiff's taxes.

It appears, from the reported facts in the case, that the defendant was the highest bidder and purchaser at his own auction. This conduct of the defendant was clearly a violation of his official duty. Such a practice must, if it did not in the present instance, lead to fraud in the publication of notices, and the selection of places of sale. The respective duties of buyer and seller are incompatible with each other, and no person, in whatever capacity he may undertake to act, can rightfully sustain both characters. But a sale by an officer or other trustee to himself, is not absolutely void. The cestui que trust has an option to affirm or avoid it, as he may judge most advantageous to himself. As the plaintiff had made no election to annul the sale by a demand of the property, or otherwise, before the commencement of the action, it may well be doubted whether, upon this ground, he could recover.

But it further appears, that more than six days elapsed after the seizure of the distress, and before the sale. This, in our opinion, is fatal to the defendant's justification.

The *St.* 1785, *c.* 70, § 2, regulates the proceedings of collectors and constables on warrants for the collection of taxes. These proceedings are modified, in a way not affecting the present case, by the *St.* 1791, *c.* 22, § 2. The former statute requires the collector or constable distraining for non-payment of taxes, to keep the distress four days, and if the taxes

Digitized by Google

Pierce v. Benjamin.

be not then paid, to advertise forty-eight hours, and *then*, viz at the end of six days, to sell at public auction. The latter statute authorizes the *forty-eight hours'* notice to be given *within*, and the sale to be made at the expiration of the *four days*. It is immaterial to the present inquiry, whether the latter statute is imperative or only gives the officer a discretion to advertise within or at the end of the four days, as he may judge expedient. *Lane* v. *Jackson*, 5 Mass. R. 157; *Caldwell* v. *Eaton*, 5 Mass. R. 399. The officer did not offer the distress for sale within six days and therefore cannot protect himself under either of these statutes. Having no legal justification for the forcible seizure of the plaintiff's property, he stands in the same relation to him as if he had originally taken it without any authority; and must be deemed a trespasser *ab initio*.

It is important to the rights of property, that positive regulations authorizing the seizure and sale of chattels without the consent of their owner, should be lawfully and strictly complied with. The defendant has failed to do this. Although the original purpose of the taking was proper and the taking itself *rightful*, yet when there was a failure to make a lawful application, the whole became unjustifiable from the beginning. Having used the goods unlawfully, or applied them to an improper purpose, the officer cannot be permitted to show that they were taken for a purpose to which they were not applied, or upon authority on which they were not subsequently holden. The defendant not being allowed to show that the original seizure was made by any lawful authority, and it being without the consent of the owner, it must of course be *wrongful*. *Purrington* v. *Loring*, 7 Mass. R. 388; *Nelson* v. *Merriam*, 4 Pick. 249. The *tortious* taking of personal property is a *conversion* of it; and therefore trover will lie, without demand and refusal. And it may be laid down as a general proposition, that where trespass *de bonis asportatis* lies, *trover* will also lie. See the authorities cited by the plaintiff's counsel on this point.

It cannot be pretended, that the payment of the balance of the taxes and the taking a receipt for the whole, by the plaintiff, was any acquiescence in the illegal proceedings of the

Digitized by Google

defendant or any waiver of the right of action. The taxes he was bound to pay in full, and on failure was liable to another distress, or to a personal arrest and imprisonment. The purpose for which the receipt was required, is a sufficient explanation of that act, if indeed any were necessary.

The general rule of damages in actions of trover is, unquestionably, the value of the property taken, at the time of its conversion. But there are exceptions and qualifications of this rule, as plain and well established as the rule itself. Whereever the property is returned, and received by the plaintiff, the rule does not apply. And when the property itself has been sold and the proceeds applied to the payment of the plaintiff's debt, or otherwise to his use, the reason of the rule ceases and justice forbids its application. In all such cases the facts may be shown in mitigation of damages. These principles are supported by many adjudications, and are founded in equity and practical convenience. *Wheelock* v. *Wheelwright*, 5 Mass. R. 104; *Caldwell* v. *Eaton*, 5 Mass. R. 399; *Prescott* v. *Wright*, 6 Mass. R. 20; *Squire* v. *Hollenbeck*, 9 Pick. 551; *Sheldon* v. *Sheldon*, 13 Johns. R. 220.

The rule which for convenience was adopted on the trial of this case is not the correct one. The verdict, according to the arrangement entered into by the parties, must be amended by deducting the amount applied towards the payment of the plaintiff's taxes, and judgment must be rendered on it for the balance.

Digitized by Google

AMARIAH TAFT *versus* OBADIAH WOOD *et al.*

The *St.* 1823, *c.* 138, § 5, providing that assessors shall be responsible only for the want of integrity and fidelity, in the assessment of taxes upon the inhabitants of any "city, town, district, parish or religious society," does not apply to the assessment of a tax on the inhabitants of a school district. [Altered by Revised Stat. *c.* 7, § 44.]

By *St.* 1826, *c.* 143, § 11, assessors are required to assess, *in the same manner as town taxes are assessed*, on the polls and estates of the inhabitants of school districts, all moneys voted to be raised by the inhabitants of such districts, for the erection of schoolhouses, &c.; and by the tax act, *St.* 1828, *c.* 143, § 3, they were required, in assessing taxes, to assess one sixth part of the whole sum to be raised on the male polls, as nearly as could be conveniently done, provided that the whole amount of poll taxes assessed in any one year on any individual, for any city, town and county purposes, highway taxes excepted, should not exceed the sum of $1·50. It was *held*, that this limitation of the poll tax to $1·50 did not apply in the case of the assessment of a school district tax made by virtue of these statutes, a school district tax being in its nature occasional, and not annual. [See Revised Stat. *c.* 7, § 27, and *c.* 23, § 37.]

The *St.* 1826, *c.* 143, § 11, [Revised Stat. *c.* 23, § 35,] requires assessors, before assessing any school district tax, to determine in which district the lands of persons residing out of the limits of the town shall be taxed, and to certify in writing their determination to the clerk of the town, who is to record the same; and where a school district tax was assessed, and the assessors neglected to comply with these provisions, it was *held*, that the assessment was invalid; and that an inhabitant of the district might avail himself of such defect.

THIS was trespass, for an arrest of the plaintiff by a collector of taxes, under a warrant, issued by the defendants, for the collection of a school district tax in Mendon.

The defendants pleaded the general issue, and filed a brief statement of the special matter of their defence, in which they justified as assessors of the town of Mendon.

At the trial, before *Morton* J., it appeared, that the plaintiff was an inhabitant of the school district, and liable to be taxed there; that the clerk of the district, on October 29, 1829, certified to the defendants, that at a legal meeting of the inhabitants thereof on December 14, 1827, it was voted to raise the sum of $800, and to cause the same to be assessed and collected, for the purpose of building a schoolhouse; that this sum was assessed upon the polls and estates in the district by the defendants; that the tax bills and warrant, for the collection of the same, were committed to the collector; that the plaintiff was assessed the sum of $25·57; and that he was arrested by the collector for the non-payment of the tax.

Digitized by Google

The plaintiff objected, that the polls in the district were assessed $1·87 each, whereas the *St.* 1828, *c.* 143, § 3, provides that the poll tax shall not exceed $1·50. It appeared, that the sum assessed upon the polls, in the present instance, did not exceed one sixth part of the whole sum to be raised, and that if the poll tax had been reduced to $1·50, the amount of the plaintiff's tax, being principally assessed upon property, would have been increased. The objection was overruled.

The plaintiff further objected to the validity of the assessment by the defendants, because it did not appear, that the assessors had determined and certified in writing their determination to the town clerk, or caused the same to be recorded in the town clerk's office, in what school districts in the town, the lands of persons residing without the limits of the town, respectively, should be taxed, before they proceeded to assess the tax. For the purposes of the trial, this objection was overruled.

The defendants contended, that by *St.* 1823, *c.* 138, they were responsible only for their integrity and fidelity in the assessment of the tax. This point was also overruled, for the purposes of the trial.

It was proved, that a certain lot of land, with the buildings thereon, situated within the limits of the district, which was owned by a non-resident, but occupied by an inhabitant of the district, was not assessed. It also appeared that other lands belonging to non-residents were included in the assessment.

Several other objections were made to the regularity and validity of the proceedings of the school district in the election of the clerk and in voting the money assessed, &c., which it is not necessary to state.

The jury, under the direction of the court, returned a verdict against the defendants, for the sum of $33·75, subject to the opinion of the whole Court, upon the questions raised by the parties in the course of the trial.

Oct 1st

Davis and *Washburn*, for the plaintiff, cited to the point, that the assessors were liable in this action, *Little* v. *Merrill*, 10 Pick. 543; that the proceedings of assessors are to be construed with strictness, *Libby* v. *Burnham*, 15 Mass. R. 148; that the assessment was invalid, because it did not ap-

Digitized by Google

Taft v. Wood.

pear, that the assessors, before they assessed the tax, had determined in what school districts the lands of non-resident owners should be taxed, and certified their determination to the town clerk, *Thurston* v. *Little*, 3 Mass. R. 432; that the provision of *St.* 1823, *c.* 138, § 5, was not applicable to this assessment, *Little* v. *Merrill*, 10 Pick. 543.

Merrick and *W. S. Hastings*, for the defendants, cited to the point, that the omission to tax land of a non-resident did not vitiate the assessment, *Dillingham* v. *Snow*, 5 Mass. R. 547; *Inglee* v. *Bosworth*, 5 Pick. 498.

April term 1834.

Shaw C. J. delivered the opinion of the Court. It is much to be regretted that in a matter so vitally affecting the interests of the community, in one of its very important concerns, so many questions and subjects of litigation, should arise. But since it has been the policy of the commonwealth to divide the towns into school districts, various powers have from time to time been conferred upon these districts by statute, until they have become, to some extent, legal corporations. Still, having acquired this character, slowly and by successive enactments, not in terms making them corporations, but investing them with powers, which, by implication, clothe them with the attributes of incorporation, they remain corporations of a very anomalous character, to which it is difficult to apply the rules of law, which regulate corporations generally. They are extremely limited in their powers, being confined solely to the object of erecting and furnishing school houses, or otherwise providing places for schools. They are still more limited in their power of action, being dependent upon the officers of their towns, for their original means of organization, and also for carrying their measures into effect. The consequence of this anomalous character is, that the correctness of their proceedings depends upon a strict compliance with a series of statute regulations; and it requires but little experience to be convinced how difficult it is, in establishing a new system, to provide by statute a series of rules, so comprehensive as to meet all the contingencies which may arise in carrying it into execution, and so plain and practical in their directions, as not to be overlooked or misconstrued by the multitude of persons, who are called to act under them. But

Digitized by Google

these are evils incident to a new system, and a very useful one, which time and experience will gradually correct; and perhaps even now, with the experience already acquired, it might be useful for the legislature, to revise the whole system of the organization and action of school districts, and by a well digested series of practical regulations, drawn up with the best aids which experience, care and practical sagacity, can furnish, so to mould their organization and direct their proceedings, as to remove much of the uncertainty and doubt, and close up many of the sources of controversy and litigation, which now exist.

Upon the trial of this cause several questions were reserved for the consideration of the Court, which have been argued by counsel.

It was contended, that an action of trespass will not lie, since the St. 1823, c. 138, § 5, which renders assessors liable only for their integrity and fidelity, in assessing a tax upon the inhabitants of any city, town, district or parish, of which they are assessors, when thereto required by the constituted authorities thereof.

The construction of this section of the statute underwent a full consideration in the case of *Little* v. *Merrill*, 10 Pick. 546; and it was there held, that this statute does not apply to the case of an assessment made by assessors of a town, upon the inhabitants of a school district. That case, of which the grounds are fully stated in the report, is decisive of the present question. The case not being within the exemption created by the statute, it must be governed by the long and uniform course of decisions in this commonwealth, holding assessors liable in an action of trespass, where a tax has been illegally assessed, and where, by force of the assessors' warrant, the person of the party has been arrested, or his property seized. Whatever may be the supposed hardship upon these officers, we consider the law upon this subject to be perfectly well settled.

One objection to the proceedings of the defendants, of considerable practical importance, which was strongly pressed upon the attention of the Court, seems to be effectually removed by a careful comparison of the statutes. The objection

Digitized by Google

Taft v. Wood.

is, that the plaintiff was assessed $1·87, for a poll tax, whereas, by law, he could only be assessed to the amount of $1·50, in a single poll tax.

By the statute under which this assessment was made, *St.* 1826, *c.* 143, § 11, the assessors are required to assess *in the same manner*, as town taxes are assessed, on the polls and estates of the inhabitants &c., and on the lands &c., all moneys voted &c. for the purposes aforesaid. By *St.* 1828, *c.* 143, § 3, being the last general tax act, which had passed before the tax in question was assessed, and which at the time regulated the assessment of town taxes, the assessors were required to assess one sixth part of the whole sum to be raised, on the male polls, as nearly as could be conveniently done, with a proviso, that the whole amount of poll taxes, assessed in any one year, on any individual, for any city, town and county purposes, (highway taxes excepted) should not exceed $1·50.

We think the words, in the school district act, *in the same manner* &c., do not extend so as to include this restriction as to poll taxes. This restriction, in terms, applies only to taxes levied for town and county purposes; it does not fix the proportion for a single tax, but only fixes a maximum to all poll taxes on an individual, for a single year. But the consideration which we deem most decisive is, that the contemplated town tax is an annual tax, whereas the school district tax occurs but seldom, most commonly for building a schoolhouse, an occasion likely to occur only at long intervals. It may be very reasonable to provide, that the whole of one's poll taxes for a year, shall not exceed a given sum; and quite otherwise, where such tax is to occur once only in twenty or thirty years, and must then require a tax, in the aggregate, large. We think therefore that this limitation of the whole amount of one's poll tax, for one year, cannot apply to an occasional school district tax, not in its nature annual.

But without considering all these objections in detail, we think there is one, which shows the assessment to be illegal and void; that it goes to the merits of the case, and is decisive. It is necessary to look carefully at the objects and purposes of this statute, providing for the instruction of youth, *St.* 1826,

Digitized by Google

c. 143, in order correctly to understand and expound its various provisions.

Towns are authorized to determine and define the limits of school districts; *St.* 1789, *c.* 19, § 2; and this must be done, by local limits. *Withington* v. *Eveleth*, 7 Pick. 106. They thus become *quasi* territorial corporations. As such they are empowered by *St.* 1826, *c.* 143, § 10, to raise money for erecting or repairing a schoolhouse in their respective districts, or to purchase or hire any house or building to be used as a schoolhouse, and also to purchase land for a schoolhouse to stand upon, and for the accommodation of the same; also, to raise money to procure necessary utensils, for the respective schoolhouses. This is the extent of their powers of raising money. And from this view of the occasions for the exercise of this power, it is very obvious that it may sometimes happen, that a heavy tax is necessary to rebuild a schoolhouse and furnish it, in a particular district, and no further tax may become necessary for many years.

It is further to be considered, that this duty of supporting and maintaining schools is still recognised as a municipal duty, charged upon towns in their corporate capacity; that the expense for supporting schools and providing instructors, is still the duty of towns and not of school districts; and that the sole purpose of the district organization is, to provide and furnish schoolhouses. And even by the proviso of § 2, it is left optional with towns thus to divide their territory into districts, for building schoolhouses, or to carry the whole system into execution, in their own corporate capacity, without the intervention of districts. The whole duty being a charge upon the town, it is right that the expense of building schoolhouses, as well as the other charges incident to the system of education in common schools, should, as far as practicable, be supported by an equal tax upon the polls and property of the town. The statute directing the mode of taxation, § 11, seems specially designed to promote that object. In many cases, it is obvious that a tax upon all the property of non-residents, in the districts in which it lies, would be very unequal in its operation upon the several districts. It is a question of equality among the districts. It would in general be wholly immaterial to the

Digitized by Google

Taft v. Wood.

non-resident owner, in which district his estate is taxed, if not taxed unequally. The non-resident property, as a source of taxation, is a fund belonging, not to the district, but to the town.

It is with a view to this purpose of taxation, and this condition of the taxable property, within the town, that the statute, in the section cited, § 11, provides, "that lands where the owner thereof lives without the town, shall be taxed in such district as the assessors, having regard to the local situation thereof, shall appoint; and it shall be the duty of the assessors, before they assess a tax for any district, to determine in which district such lands respectively shall be taxed, and to certify in writing their determination to the clerk of the town, who shall record the same; and such land, while owned by any person residing without the limits of the town, shall be taxed in such districts, until the town shall be districted anew."

It appears to the Court, that this is a most important provision, a strict compliance with which is essential to an equal taxation. This previous distribution of the districts, and a permanent record of it, are necessary to the rights of all parties. When once made by the board of assessors, it becomes permanent and binding upon their successors. They cannot alter it. It is as important to the tax-paying inhabitants of the district, as to the non-resident owners. Without it, property might not only be liable to taxation in different districts, in different years, and thus be over-taxed, for building schoolhouses, but it might escape taxation for this object altogether, to the injury of the resident inhabitants. The filing of the certificate is necessary, not only as a security to the owner against over-taxation, and as a security to the several districts, that each shall have the benefit of its due proportion of the taxes on non-resident property; but as all town officers are annual, and changing from year to year, such certificate is necessary for the future information and government of the town and its officers.

It seems analogous to the case where a copy of the assessment of town taxes, and a copy of the invoice and valuation, have not been lodged in the office of the town clerk, as required by

Digitized by Google

statute, in which case it is held that the assessment is illegal; and a sale of land made to enforce it, is void. *Blossom* v. *Cannon*, 14 Mass. R. 177. So where a copy of the valuation has not been left with the town clerk, or filed in the assessors' office, before the warrant for assessing the taxes was committed to the constable, as required by statute, it is held, that the tax is not valid. *Thayer* v. *Stearns*, 1 Pick. 482.

In the present case, it did not appear, nor was it suggested in the argument, that the assessors had determined in writing, and certified to the town clerk, or caused the same to be recorded in the town clerk's office, in what school districts in the town, the lands of non-resident owners respectively should be taxed, before they proceeded to assess the tax; nor, that any such determination had been made and recorded by any previous board of assessors in said town; nor was it denied that there were such lands within the town.

This, we think, is decisive against the validity of the tax now under consideration; and it therefore does not justify the arrest made to enforce it.

It is to be considered, that the provision requiring such distribution of non-resident property among school districts, and when once made, rendering it permanent, until the town shall be districted anew, was not a new provision in the *St.* 1826, *c.* 143, but a re-enactment in terms of a like provision in *St.* 1799, *c.* 66, § 2, which was repealed by that of 1826, *c.* 143. [And see Revised Stat. *c.* 23, § 35.]

It was contended in argument, that as it did in fact appear, that the assessors included some and omitted other non-resident property, it is to be inferred, that they made a distribution before assessing the tax. Probably they did; but not in such form as to meet the exigencies of the statute. The law looks not only at the particular tax, but to the taxes in other districts and in future years as long as the districts remain, to be equalized and adjusted by such a settled and permanent distribution.

It was further contended, that the written certificate of such distribution made by the assessors, and recorded, was designed solely for the security of non-resident proprietors against double taxation, and therefore the want of it is a defect, of which the

Digitized by Google

Taft v. Wood.

plaintiff cannot avail himself. But we are of opinion, for the reasons stated, that this is too limited a view of this express requisition; that as it may in various ways operate so as to benefit and secure all the parties, all have an interest in insisting upon a compliance with it. A remark of the Court in *Blossom* v. *Cannon*, 14 Mass. R. 177, which was upon a question of title, under a collector's sale, strongly applies to this case; they say, "that the returning of the valuation and a copy of the assessment to the town clerk being a salutary and necessary regulation, essential to the citizens in general, can, in no case, be dispensed with."

This point being decisive against the validity of this assessment, the defendants have not maintained their justification, and consequently there must be

Judgment on the verdict.

COMMONWEALTH *versus* MOSES B. STEPHENS.

Where, upon an indictment in the Court of Common Pleas, the defendant was found guilty, and the cause was brought before this Court upon exceptions taken by the defendant in pursuance of *St.* 1832, *c.* 130, § 5, it was *held*, that no other questions could be considered in this Court than those reserved by the bill of exceptions.

Upon an indictment under *St.* 1820, *c.* 45, [Revised Stat. *c.* 35, § 8,] for peddling jewelry, it was *held*, that plain gold ear-rings and knobs were comprehended in the signification of the term "jewelry," as it is used in the statute.

THIS was an indictment against the defendant, for selling jewelry as a pedler, contrary to *St.* 1820, *c.* 45.

At the trial in the Court of Common Pleas, before *Cummins* J., it was proved on the part of the commonwealth, that the defendant went on foot, from place to place in the town of Douglas, offering for sale divers goods; that he had plain gold rings, or those which he called such; and that, among other things, he offered for sale and did sell a pair of gold knobs for ear-rings. The jury were instructed, that plain gold rings and ear-knobs were comprehended in the word "jewelry," as used in the statute. The jury returned a verdict of guilty. The defendant excepted to this instruction of the judge.

Digitized by Google

Commonwealth v. Stephens. Oct. 1st.

Isaac Davis, for the defendant, objected to the conviction, on the ground, that *peddling* signifies the act of selling or offering for sale in more than one instance, and that it did not sufficiently appear, that this was proved. *Rex* v. *Little*, 1 Burr. 609. To the point, that plain gold ear-rings were not comprehended in the signification of the word "jewelry," he cited Webster's Dict. *Jewelry*; Johns. Dict. *Jewel*; 1 Rob. on Wills, (2d edit.) 422; Ezekiel, *c.* 16, *v.* 12; Hosea, *c.* 2, *v.* 13.

Austin, Attorney-General, for the commonwealth, cited Exodus, *c.* 11, *v.* 2, and *c.* 12, *v.* 35.

April term 1834.

SHAW C. J. delivered the opinion of the Court. This case comes before the Court, upon exceptions taken to the directions of the Court of Common Pleas, in matters of law, pursuant to the provisions of the *St.* 1832, *c.* 130, § 5, being the new statute by which great changes were made in the laws of this commonwealth in relation to criminal jurisdiction.

An objection was taken to the conviction on the part of the defendant, upon the authority of *Rex* v. *Little*, 1 Burr. 609, that peddling must include the act of selling or offering for sale, in more than one instance, and that it did not sufficiently appear, that this was proved. But it was answered and contended by the attorney-general, that as no exception to this effect was taken at the time of the trial, this point was not open.

And the Court are all of opinion, that this point is not open, and is not before this Court, upon these exceptions.

The case in Burrow was a summary conviction before a magistrate, where nothing was to be presumed, and nothing considered as true, except what was recited in the conviction.

But the case here, was upon indictment, and a trial by jury, before a court of competent jurisdiction, and a general verdict of guilty. We are therefore to presume that all the facts were proved, necessary to sustain that verdict, and nothing comes before this Court, but questions of law. Where such questions depend upon an opinion or direction of a judge of the Common Pleas, not appearing on the record, the party aggrieved thereby is authorized by the statute to allege exceptions thereto, which being reduced to writing in a summary

Digitized by Google

Common-wealth v. Stephens.

mode, and presented to the court during the same term and found conformable to the truth of the case, shall be allowed, &c.

It seems to us very manifest, as well by analogy to other cases, as by reference to other parts of the statute, that such bill of exceptions is not to be deemed a general report of the case, and is not considered to embrace any more of the facts proved, than are necessary to raise the points of law relied upon. To any other part of the case, the attention of the judge who allows the exceptions, is not called. By another part of the same section of the statute it is provided, that where a person is on trial, without the aid of counsel, and any question of law shall arise, which, in the opinion of the presiding judge, is a question of magnitude or difficulty, it shall be his duty, if the defendant consent thereto, to report the facts in said case, *so far as to present the question of law* arising therein. This clause shows that it was the intention of the legislature, not that a general report should be made of the facts in the case, but such only of the facts as shall be sufficient to present the question reserved. In like manner we think, upon the other clause in the section, it was intended, that the bill of exceptions stated by the party and allowed by the judge, should contain only such an abstract of the facts or evidence, as to present distinctly and intelligibly, the question raised by the exception. It follows, of course, that no other question can be considered in this Court, upon the exceptions, than those particularly raised below, because the case is not framed with reference to such other questions. This rule however has no application, where the question of law arises on the record. To apply the rule to the present case. The only direction of the court, to which exception was taken, was that which went to give a construction to the meaning of the word "*jewelry*" in the statute. As to what constitutes peddling or trading, or selling or offering to sell, within the true meaning of the statute, it does not appear by this bill of exceptions, what directions were given by the court, nor what evidence was offered to the jury; and we have therefore no means of judging of the sufficiency of the one, or of the correctness of the other.

Upon the main question, the statute prohibits hawkers &c.

Digitized by Google

from selling or exposing for sale, any goods, &c., with a proviso, that this prohibition shall not extend to goods, the produce or manufacture of the United States, except indigo, feathers, books, tracts, prints, maps, playing cards, lottery tickets, jewelry and essences. The question is, whether plain gold earrings and knobs, without any precious stone, pearl or other gem set in them, constitute jewelry. It is a general rule of construction, applicable to statutes, that words are to be considered as used in their general and popular sense, unless they have acquired a technical meaning, or unless it appears from the whole taken together, that a different meaning was intended. There is nothing in this statute to indicate that any other than the general and popular sense was intended in the use of this word.

Jewelry is not found in any English dictionary, and is probably an *Americanism*. It is defined in Webster to be jewels in general. He defines "jewel" to be "an ornament worn by ladies," "a pendant in the ear." It is manifest however, that these are put by way of instances, and not intended as strict definitions.

The term "bijou," which seems to be nearly analogous to it in the French language, is defined to be "a little work of ornament, valuable (precieux) for its workmanship or by its material. *Cette femme a de beaux bijoux.*" Dict. de l'Acad.

The counsel on both sides cited passages of scripture, to show on the one side, that the translators of the common version included ornaments of gold under the name of jewels, and on the other, to show, that by a distinct enumeration, they excluded them. These instances do little more than show, that though the argument founded on them, is at first view plausible, it would be entirely unsafe to rely upon it as a ground of legal construction. Nor can much more reliance be placed upon lexicographers; they are necessarily confined in a considerable degree to generalities, and cannot ordinarily go into minute and very accurate distinctions. On the best consideration we have been able to give the subject, we are satisfied that the legislature, in the use of the word "jewelry," intended to employ it as a generic term, of the largest import, including all articles under the genus. Without attempting to define the term used in the statute, we

Digitized by Google

Commonwealth v. Stephens.

are all of opinion, that ear-rings and ear-knobs, are included under the term "jewelry," as it was used in the statute; that the direction of the judge of the Court of Common Pleas was correct; and that the judgment of that court must be affirmed.

WARREN HUNT *versus* OLIVER HUNT *et al.*

The owner of land mortgaged it to V, in 1803, but continued in possession. In January, 1810, he made a deed of the same land to A, and in March, 1810, he made a deed of it to T. The mortgagee, in 1812, conveyed the land to T, by a deed of quitclaim, in the usual form, with a covenant of warranty against himself and any person claiming under him. It was *held*, that this conveyance to T, who had taken from the mortgager the second deed of the equity of redemption, did not operate as an extinguishment or merger of the mortgage, so as to give a priority to A, but that it operated as an assignment of the mortgage.

The erection of buildings on mortgaged premises, by the mortgager while remaining in possession, will not operate as a disseisin of the mortgagee, but will be regarded as improvements made to enhance the value of the equity of redemption.

A mortgagee cannot be disseised by the mortgager.

THIS was trespass *quare clausum* against the defendants, for entering upon the southern part of a mill-dam across Mumford's river in Douglas, cutting away a portion of it, inserting a gate therein and hoisting the same on divers days, thereby causing the water in the mill-pond to escape. The defendants pleaded the general issue, and soil and freehold in themselves. The trial was before *Morton* J.

The parties stated, that their object was, to determine the question of title to that part of the dam, which lay upon the south side of the middle of the river; and all objections to the form of the action were waived. The defendants conceded, that the acts complained of were committed by them.

It was admitted, that in 1803, Samuel Legg was the owner of a farm bounded northerly by the middle of the river; that previously to 1810, he had constructed a dam across the river, placing one end of it on his own land, and extending it to and upon the land of Benjamin Craggin, on the north bank of the river, and had erected a fulling-mill upon Craggin's land, and that this was done with the permission of Craggin.

The plaintiff, to prove his title to the locus, gave in evi-

Digitized by Google

dence a warranty deed from Legg to Benjamin Adams, dated January 11, 1810, and recorded January 30, 1810, of which the following is an extract: "I do hereby give, grant, sell and convey unto the said Benjamin Adams, his heirs and assigns, a certain building, with a fulling-mill thereon, situate in Douglas aforesaid, on the north side of Mumford's river, on land of Benjamin Craggin Esq., and lies north of the house where the grantor now lives, together with the dam erected across said river and the floom to the south bank of said river, together with all the privileges and appurtenances to the same belonging, or in any wise appertaining." On September 1, 1813, Craggin conveyed an undivided half of the mill, the land around the same and the dam, to Benjamin Adams. On June 1, 1819, Benjamin Adams conveyed one quarter part of the same to John and Josiah Adams, to be held in common with himself and Craggin, in the proportion of one half by Craggin, one quarter by Benjamin Adams, and one eighth each by John and Josiah Adams. On August 30, 1826, Craggin conveyed his half of the premises, including the dam, to Benjamin, John and Josiah Adams, who, on March 3, 1828, mortgaged the estate to John Capron and Sons. On January 19, 1829, the mortgage was assigned by Capron and Sons, to the Blackstone Bank. On September 29, 1830, the bank assigned it to Josiah Chapin, who, on August 24, 1829, had purchased the equity of redemption, at a sheriff's sale made by virtue of an execution against Benjamin and John Adams, the surviving partners of Josiah Adams, then deceased. On September 29, 1830, Chapin conveyed the premises, including the dam, to the plaintiff.

It appeared, that the successive owners of the works upon the north side of the river, had occupied the same from the time of the conveyance of Legg to Adams, and had kept up, during all that time, a head of water by means of the dam; and that the dam was washed away, and a new one erected on the same site, by Craggin and Adams, about the year 1823.

The title set up by the defendants was as follows.

On April 4, 1803, Legg mortgaged to Nathan Verry, his farm lying upon the south side of the river and bounded by the thread of the stream, to secure the payment of the sum of

Digitized by Google

Hunt v. Hunt.

$600. On March 15, 1810, Legg's equity of redemption was sold to Asa Thayer, at a sheriff's sale, and on the same day was conveyed to him by the officer who made the sale; but in consequence of a defect in the return on the execution, the title to the equity of redemption did not pass by the deed. On March 24, 1810, Legg quitclaimed the farm, to the thread of the river, to Asa Thayer. On May 28, 1810, Verry commenced a suit against Legg upon the mortgage, to recover possession of the mortgaged premises, and in September 1811, obtained judgment. On December 11, 1811, a writ of possession was issued, and by virtue thereof, possession was delivered to Verry on February 7, 1812, the farm being then occupied by Legg. On May 21, 1812, Verry conveyed the same premises to Asa Thayer by a quitclaim deed in the usual form, containing a covenant, "that neither I, nor my heirs, nor any person claiming from, by, or under me or them, shall have or claim any right," &c. Asa Thayer afterwards conveyed the farm to Amory Thayer, reserving one acre, which included the locus. Upon the death of Asa Thayer in April 1828, this acre of land became the property of Royal and Asa Thayer, who, in September 1829, conveyed the same to the defendants, the deed being delivered upon the locus; which they had entered upon for the purpose.

No evidence was offered by the defendants to show, that any notice had been given to the occupants or claimants of the works on the north side of the river, previously to the time when the plaintiff became a proprietor thereof, that any entry had been made upon the southern part of the dam by any one claiming to own the same.

In order to raise the question of title, the judge ordered a nonsuit, with leave to the plaintiff to move the Court to take off the same and grant a new trial.

Oct. 2d

Davis and *Washburn*, for the plaintiff, cited to the point, that the conveyance from Legg to B. Adams passed a fee in the dam and not an easement merely, *Leonard* v. *White*, 7 Mass. R. 60; that the judgment recovered by Verry against Legg was *inter alios*, Legg not being in possession of the locus, and therefore did not bind the plaintiff, *Chase* v. *Hathaway*, 14 Mass. R. 222; 1 Stark. on Evid. 192: that as Adams was

Digitized by Google

in possession of the dam and water-privilege adversely, at the time of the quitclaim conveyance by Verry to Asa Thayer, the locus did not pass by the deed, whether it be considered as a grant or a release, *Poignard* v. *Smith*, 8 Pick. 272; *Russell* v. *Coffin*, 8 Pick. 152; that the quitclaim deed of Verry to Asa Thayer operated as a discharge of the mortgage of Legg to Verry, there being a privity of estate between Legg and Thayer, Com. Dig. *Estoppel B*; *Wade* v. *Howard*, 6 Pick. 496; *S. C.* 11 Pick. 289; *Maynard* v. *Hunt*, 5 Pick. 240.

Hoar and *Newton*, for the defendants, cited to the point, that the deed from Verry to Asa Thayer was an assignment and not an extinguishment of the mortgage, *Gibson* v. *Crehore*, 3 Pick. 475; *S. C.* 5 Pick. 146.

April term 1834.

Shaw C. J. delivered the opinion of the Court. The fact averred as a trespass, being admitted, and both parties being desirous that the cause shall be considered and decided upon the general question of title, it has been argued upon that ground, and it has been so considered by the Court. The conveyances set forth in the report, have been so numerous and various, extending through a period of thirty years, that it is somewhat difficult to understand the precise question; and it requires a careful attention to dates and other particulars, to ascertain what the true questions of law are, and to render them intelligible. The small parcel of land about which the question of title arises, is the southerly half of a mill-dam across a stream known as Mumford's river, in the town of Douglas. Probably the right of soil involves also the water-privilege incident to it, and renders it an object of value. Both parties claim under titles derived from Samuel Legg, and it is conceded by both, that Legg was the undisputed owner of the soil, in 1803.

Legg's farm was situated on the southerly side of the stream, and was bounded of course by the central line, or thread of the stream. There was then no dam at the place. The first conveyance was that from Legg to Verry, in mortgage, to secure $600, by deed dated April 4, 1803. The description was of the whole farm, bounded northerly by the thread of the stream, and of course, large enough to embrace the soil

Digitized by Google

Hunt v. Hunt.

upon which the southerly half of the dam now stands. Legg, the mortgagee, remained in possession several years, and at least until 1810, and during that period built the dam in question. At the time the dam was built, the land on the northerly or opposite bank of the river, was owned by Craggin. Legg built the northerly half of the dam, and also a fulling-mill, on Craggin's land, with his permission. Such was the state of the title, when Legg, by his deed of January 11, 1810, conveyed the fulling-mill to Benjamin Adams, together with the dam erected across said river and the floom, "to the south bank of said river," with the appurtenances. This deed in terms, embracing the whole of the dam, to the south bank, included in its description the southerly half now in question, and this estate passed by Legg's deed to Adams, subject however to the mortgage to Verry. At that time Legg did not profess to own the land on the north side, but described the mill and northerly end of the dam as being on Craggin's land. But Craggin and Adams by several conveyances united their interests, and in regard to the plaintiff's title, without examining all the several steps, it is sufficient to say, that by various mesne conveyances, the estate thus conveyed by Legg to Adams, came to the plaintiff, and if he is not defeated by a title derived under Legg's mortgage to Verry, which was prior in time, he has established his title.

Whether the defendants can trace back their title to the mortgage from Legg to Verry in 1803, so as, in point of time, to overreach the plaintiff's title, is the question between the parties. That title is stated thus. On March 15, 1810, the equity of redemption of Legg, the mortgager, was sold at an officer's sale, but the proceeding being informal, it is conceded that nothing passed, and that may be laid wholly out of the case.

But on March 24, 1810, Legg conveyed the farm to Thayer by a quitclaim deed. This deed embraced the whole farm to the thread of the river, and so was broad enough in its terms, to include the southerly half of the mill dam; still, that half of the dam could not pass by it, because the same Legg had by his deed several weeks before, conveyed that part of his estate to Adams, who, as between these two

Digitized by Google

deeds, had the elder and better title. The defendants, therefore, before they can succeed, must establish a title as derived from the earlier deed of Legg, being his mortgage to Verry.

It appears that Verry commenced a suit on his mortgage, in May 1810, obtained judgment, and had his writ of possession in 1811, and was put into possession by an officer, by force of the writ, in February 1812.

In May 1812, Verry conveyed the same premises to Asa Thayer, by a quitclaim deed, in usual form, with a covenant, that neither he, nor his heirs, nor any person claiming from, by, or under him or them, should have or claim any right, &c. This deed embraced in its description, all that was included in Legg's mortgage to Verry, and of course included the southerly half of the dam, being the place in controversy. Now, if the deed from Legg to Asa Thayer, of May 1810, conveying his equity of redemption, is the foundation of the title claimed under Thayer, and the deed from Verry to Thayer is to be taken as a discharge of the mortgage, it is evident that the title derived through Thayer, commenced at a later period than that derived through Adams, and of course must fail. But if the deed from Verry to Thayer was a good assignment of his mortgage, then the title derived through Thayer is the elder and better title. The great question therefore is, whether the quitclaim deed from Verry to Thayer, with covenants against himself, his heirs, &c., was an extinguishment and discharge of the mortgage, or an assignment and conveyance of the title created by it. This conveyance by Verry to Thayer was executed May 21, 1812, after Verry the mortgagee had been put into possession under his judgment against Legg, and it is stated, in the report, that he thereby conveyed the same premises to Asa Thayer, by a deed of quitclaim, made in the usual form, containing a covenant of warranty against all persons claiming under him or his heirs. By this, we are to understand, that it was a deed given for a valuable consideration, using the terms, "remise, release, and forever quitclaim" to the releasee, his heirs and assigns, the premises as described in his mortgage deed from Legg

A mortgagee, especially after entry for foreclosure, is considered as having a legal estate, which may be alienated and

Digitized by Google

Hunt v. Hunt.

transferred, by any of the established modes of conveyance, subject only, until foreclosure, to be redeemed by the mortgager. It seems clear, therefore, that if this had been a deed in the usual form of words, "give, grant, sell and convey, release and quitclaim," and if it is apparent, that it was the intention of the releasor to transfer, and of the releasee to receive the legal seisin, title and interest in the estate, and not to cancel and extinguish the mortgage, the deed would so have operated, to pass the mortgagee's legal title. And we are of opinion, that such is the effect of the deed in the present case.

Courts of law have gone very far in modifying the rules of conveyance, both those of the common law and those which have their effect from the statute of uses, so as to give effect and operation to the deeds of parties, rather according to the manifest intent, than according to the force of the particular words used to effect the conveyance. So that where it is manifest, from the efficient words of conveyance used, that it was intended and understood, that the estate should pass, in one way, as by feoffment, bargain and sale, covenant to stand seised, or release, but some of the circumstances are wanting, which by the rules of law are necessary, to pass the estate in that form, and it cannot so pass, yet if all the circumstances exist, which are sufficient to pass the estate in another form, the Court will construe it to be a conveyance of such form, notwithstanding the words used are not properly adapted to that purpose, so as to give it effect, and cause the estate to pass.

So the common deed of this commonwealth, using the words give, grant, bargain, sell and convey, made to one to the use of another, will be construed to be a feoffment and not a bargain and sale; if it were construed a bargain and sale, it would raise a use only to the bargainee, and then by the well-known rule of law, no further use could be limited on that use, and the obvious purpose of the conveyance would fail. But by construing it to be a feoffment, a common law conveyance, by which the estate would pass without the intervention of the statute of uses, the use declared upon it would take effect and be executed by the statute. *Thatcher* v. *Omans*, 3 Pick. 521 This construction was adopted solely in pursuance of

Digitized by Google

the rule, of giving effect to the intent; because the words were altogether as apt to create a bargain and sale, as a feoffment.

So a bargain and sale, which could not operate in that form, because it would operate to create a freehold commencing *in futuro*, shall be construed to be a covenant to stand seised to uses, where the intent is apparent, and the consideration is such as to enable a court so to construe it. *Parker* v. *Nichols*, 7 Pick. 111.

In *Welsh* v. *Foster*, 12 Mass. R. 93, the difficulty was, that the deed could not take effect to pass an estate in any form, for want of some of the requisites adapted to each; and besides, the deed was to take effect upon a contingency which might not happen within the time limited by law for the vesting of estates, to prevent the creation of perpetuities.

In an English case, in the time of Lord *Mansfield*, a release was construed to operate as a grant of a reversion, in order to effectuate the intention of the parties. *Goodtitle* v. *Bailey*, Cowp. 597. But we think the point has been settled in this commonwealth by several decisions.

A release to one, not in possession, if made for a valuable consideration, will be construed to be a bargain and sale, or other lawful conveyance, by which the estate may pass. *Pray* v. *Pierce*, 7 Mass. R. 381.

So, a grantee not having been in actual possession of the premises, otherwise than by considering the grantor remaining in possession, as his tenant at will, executed to a purchaser for a valuable consideration a deed of conveyance by release and quitclaim, in the form in common use in Massachusetts, and it was held, that this was a sufficient conveyance to pass the estate, though the releasee had not any previous interest in, or possession of the estate. *Russell* v. *Coffin*, 8 Pick. 143.

Now in the present case, all the circumstances concur, which would be requisite to give the conveyance effect as a bargain and sale. These requisites are, that it must be upon a pecuniary consideration, it must be to the use of the bargainee and not a third person, to take effect immediately on the execution of the deed; and it must be enrolled.

It would seem, therefore, within the reason of the author-

Digitized by Google

Hunt v. Hunt.

ties, that if a grantor has a legal seisin only, and neither the grantor nor grantee has possession, that the estate would pass by a deed of release and quitclaim, where all the requisites exist and appear upon the deed to give it effect as a bargain and sale.

But it is not necessary to maintain the position to this extent in the present case. But supposing actual or constructive possession necessary to give effect to the deed of release and quitclaim, upon a pecuniary consideration, here there was such constructive possession in the releasor, bringing it quite within the authority of the case last cited.

By force of the mortgage deed, the mortgagee becomes seised of the estate, and the mortgager, until discharge or foreclosure of the mortgage, is *quasi tenant at will* of the mortgagee, and so the possession of the mortgager is that of the mortgagee. This brings it precisely within the principle decided in *Russell* v. *Coffin*, where the estate was in the possession of the tenant at will of the releasor, and yet a deed of release and quitclaim, to a stranger, for a valuable consideration, was held to pass the estate.

I have not relied here upon the consideration, that Verry had recovered judgment, and been put into actual possession, under his writ of seisin, which would render the deed of quitclaim conclusive as to all of which he was thus in actual possession; because, although his suit embraced all the estate included in his mortgage, and the judgment followed the writ, yet I presume Adams was not made party, and, as Legg had conveyed the half of the dam to Adams, prior to this suit, to the extent of that portion of the dam, the judgment on the mortgage, against Legg, may not perhaps be considered binding and effectual, and therefore it may be contended, that the writ of possession executed did not change the relation of Verry, as to that part of the mortgaged premises. I consider it therefore as standing upon the same footing, as the whole of the mortgaged premises did before the suit, when the mortgagee had the legal seisin, and the right of possession, and the mortgager was in the nature of his tenant at will.

Nor, in order to give effect to this quitclaim deed, have I considered Thayer as in possession under his previous deed

Digitized by Google

of the equity of redemption from Legg; because, as to the dam, Legg had previously conveyed to Adams, so that as to that part of the premises, Legg's deed to Thayer was inoperative and passed nothing, and so as to that, Thayer was not in possession, in virtue of his deed from Legg.

But it has been contended, and upon this the case of the plaintiff mainly rests, that Thayer, having purchased the equity of redemption of Legg, when he subsequently took the quitclaim deed of Verry, must, by operation of law, be considered as having paid and discharged the mortgage, by which the mortgage itself became merged in the equity and extinguished, so that a title can no longer be claimed under it. But we think this position cannot be maintained. We have already stated, that the mortgagee had a perfect right and legal power to assign his mortgage, if he thought fit, and to give to his assignee the same right which he held himself, that is, to receive the amount secured by the mortgage, from any person entitled by contract or by operation of law, to redeem, and to hold the legal estate in security of the debt, till it should be so paid. And we can see no reason why a purchaser of the equity of redemption, whether of a part or the whole of the mortgaged premises, is in any respect disabled from becoming such assignee. He may consider his equity of redemption of no value, or of small value, or the title to it invalid or doubtful; and can there be any reason in law, why he, who has the most urgent occasion for making such a purchase to protect his own interest, should be disabled from doing so, and be placed in this respect in a worse condition than a stranger?

We think this case was considered and settled in the case of *Gibson* v. *Crehore*, 3 Pick. 475, which was in principle like the present. The defendant first purchased the equity of redemption, and then took an assignment, and as against a widow claiming a right of dower, it was held that the mortgage was not extinguished.

We think there is abundant reason why no such merger and extinguishment should take place, by operation of law, against the intent of the parties. Suppose a man in good credit mortgages his real estate to two thirds of the value to A. Subsequently it is attached by B upon a secret attachment, not

Digitized by Google

Hunt v. Hunt.

known to a subsequent purchaser, or if the mortgager be in failing circumstances, it may be attached upon various or doubtful claims, or claims which may prove to be secured upon other property. Subsequently C purchases the equity of redemption. To protect his own interest he must obtain from the first mortgagee, either an assignment or extinguishment of the mortgage. If the latter, he may let in all the claims of attaching creditors, or second purchasers, and lose all the money he has paid to discharge the mortgage. If the former, then he will stand, as he ought, in the place of the first mortgagee, with an unquestioned title to the extent of the money paid for such assignment, as against all subsequent claimants, so that if they would redeem, they must first repay to him as assignee, the amount of the mortgage, leaving them to stand towards him in his capacity of purchaser of the equity, according to their legal and equitable rights, in exactly the same manner as they would have stood towards the first mortgagee himself. This is doing perfect justice to all parties. Those who have claims subsequent to the mortgage, may, if they have the right and think fit, redeem the mortgage alone, leaving the assignee to his rights as purchaser of the equity.

And so the rule was laid down in the case cited; — "Where a purchaser of a right to redeem, takes an assignment, this shall or shall not operate as an extinguishment of the mortgage, according as the interest of the party taking the assignment may be, and according to the real intent of the parties."

And we think the same result follows from considering the rule of law in relation to merger. In the case cited, it is said that mergers are odious in equity, and shall not be allowed, where the estates may well stand together. Here, we think, that both in law and equity, the estates may well stand together.

In order to effect a merger at law, the right previously existing in an individual, and the right subsequently acquired, in order to coalesce and merge, must be precisely co-extensive, must be acquired and held in the same right, and there must be no right outstanding in a third person, to intervene between the right held and the right acquired. If any of these requi-

Digitized by Google

sites are wanting, the two rights do not merge, but both may well stand together. But the case we are considering supposes, that a third person has, by operation of law, by purchase or by attachment, acquired certain rights or claims to the equity of redemption, which do not extend to the mortgage. When, therefore, the equity of redemption by purchase, and the mortgage by assignment, vest in the same individual, they do not coalesce, or merge, if there be in a third person, a right of dower, a right acquired by purchase, or a real lien by attachment, intervening between the mortgage and the equity. In such case, therefore, the estates may well stand together, and the mortgage must be kept on foot, to enable such dowress, after-purchaser, or attaching creditor, to enjoy and enforce their respective legal and equitable rights.

We think the present case is entirely within these principles. It is apparent from the form of the deed of quitclaim, from the qualified covenant against incumbrances, and from the manifest object of the parties, that it was the intent of the mortgagee, not to discharge his mortgage, but to sell and transfer his lega title in the mortgaged premises, by the species of conveyanc long known and used in this commonwealth, when the intent is to pass an estate without warranty. As Verry had a good right to assign, as Thayer was capable of receiving, as the form of the deed, in the relation in which the parties stood, was sufficient to effect this transfer, and as it was the intent of the parties, and consistent with the rules of law, that the interest and estate of the mortgagee should pass by the deed, we are of opinion, that it did extend to, and include the small portion of the dam now in controversy.

In taking this view of the subject, a question arose, whether at the time of the quitclaim deed by Verry to Thayer, in 1812, Verry was not disseised, so that no estate passed by his deed. And we think that Verry, the mortgagee, was not disseised. It was held in a late case, that a mortgagee as well as a mortgager, could be disseised by a stranger. But it must be by an actual ouster and exclusive occupation, and not by a qualified and occasional use of the land. *Poignard* v. *Smith*, 8 Pick. 272.

But it is very clear, that a mortgagee cannot be disseised

Digitized by Google

Hunt v. Hunt

by the mortgager; being tenant at will, his possession is not adverse. And any buildings, improvements or erections placed by the mortgager upon the land, must be considered as improvements upon the estate mortgaged, made by the mortgager as owner of the equity of redemption, and cannot be deemed a disseisin. The mortgager in such case must be considered as making improvements upon his own estate, of which he has the full benefit, in the enhanced value of the equity of redemption. In the present case, the facts show, that after the mortgage by Legg to Verry, the dam was built by Legg himself, some time between the years 1803 and 1810. This erection of the dam, therefore, regarding it as a structure or building like a house, did not operate as a disseisin of the mortgagee, because placed upon the premises by the mortgager. And it does not appear that after the conveyance of this dam, by Legg to Adams, the latter, or any one under him, ever did any act of ownership on that part of the dam, or even ever entered upon it, prior to May 1812, when Verry conveyed to Thayer. There appears then, no building upon the land, no enclosure, none of those acts of actual ouster and exclusive possession, which can be deemed to amount to a disseisin of the mortgagee, except those done by the mortgager, and his acts could not amount to a disseisin. We think, therefore, that Verry was not disseised, when he made his deed to Thayer, and therefore it cannot be objected upon that ground, that nothing passed by the deed.

Another question arose, namely, whether after the old dam was washed away by the floods in 1823, the erection of a new one on the same site, by Craggin and Adams, claiming under an adverse title, was not an ouster of Asa Thayer. But this question has become immaterial, because if these acts did amount to a disseisin, the right of entry remained to Asa Thayer, and, as appears by the statement of facts, duly came to his sons, who seasonably entered upon the premises, and there executed the deed to the defendants, under which they claim. If they had been disseised, this entry vested the seisin in them again; and the deed being delivered by them on the premises, the defendants became seised. We are of opinion, therefore, that the defendants have the better legal

Digitized by Google

title, coming in as they do by a title derived from the mortgagee; that the plaintiff, claiming through a deed made by the mortgager, after the mortgage, necessarily took a title subject to the mortgage, and as the mortgage has never been discharged, the defendants have the elder and better title. If the plaintiff has any claim, it must be only an equitable right, a right to redeem; which depends upon facts and questions not now before the Court, and of which we give no opinion.

Nonsuit confirmed.

ANDREW SIGOURNEY *versus* THOMAS DRURY Junior *et al.*

The payment of interest by the principal promiser in a joint and several promissory note, annually, from the time when the note was given, is sufficient to take the note out of the statute of limitations, as against the surety. [But see Revised Stat. c. 120, § 14, 17.]

ASSUMPSIT on a promissory note, dated June 13, 1823, by which the defendants, Thomas Drury junior, as principal, and Zebulon Cary and Alvah Drury, as sureties, jointly and severally promised to pay Leonard Cary or his order, the sum of $270, in one year from the date, with interest. By an indorsement on the note, dated July 20, 1823, Leonard Cary guarantied the payment of the note to the plaintiff.

By an agreed statement of facts it appeared, that Thomas Drury junior paid the interest on this note from year to year until June 13, 1831; but it did not appear, whether Alvah Drury was knowing to such payments or not, unless such knowledge would be presumed from the fact that such payments were made by Thomas Drury junior.

On January 23, 1832, Thomas Drury junior and Zebulon Cary both failed in business, and became insolvent. On January 24, 1832, this action was commenced. Thomas Drury junior and Zebulon Cary were defaulted in the Court of Common Pleas. Alvah Drury pleaded the statute of limitations, and issue was duly joined thereon.

Judgment was to be rendered for the plaintiff or for Alvah

Digitized by Google

Sigourney v. Drury. Oct. 4th.

Drury, according to the opinion of the Court upon this statement of facts.

Barton and *Bacon*, for the plaintiff, cited *Bangs* v. *Hall*, 2 Pick. 368; *Whitney* v. *Bigelow*, 4 Pick. 110; *Hunt* v *Bridgham*, 2 Pick. 581; *Oxford Bank* v. *Lewis*, 8 Pick. 458; *White* v. *Hale*, 3 Pick. 291; *Whitcomb* v. *Whiting*, 2 Doug. 652; *Smith* v. *Ludlow*, 6 Johns. R. 267; Stark. on Evid. (Metcalf's edit.) 897.

Davis and *Washburn*, for the defendants, cited *Thompson* v. *Peter*, 12 Wheat. 565; *Hathaway* v. *Haskell*, 9 Pick. 42, *Bell* v. *Morrison*, 1 Peters's Sup. Ct. R. 351; *Atkins* v. *Tredgold*, 2 Barn. & Cressw. 23; *Brandram* v. *Wharton*, 1 Barn. & Ald. 463; *Wyatt* v. *Hodson*, 8 Bingh. 309; *Perham* v. *Raynal*, 2 Bingh. 304; *Burleigh* v. *Stott*, 8 Barn. & Cressw. 36; *Pittam* v. *Foster*, 1 Barn. & Cressw. 248; 3 Kent's Comm. 26; *Bound* v. *Lathrop*, 4 Connect. R. 339; *Roosevelt* v. *Mark*, 6 Johns. Ch. R. 266, 291; Angell on Limit. 276; *Clementson* v. *Williams*, 8 Cranch, 72; *Bangs* v. *Hall*, 2 Pick. 368; *Gardner* v. *Tudor*, 8 Pick. 206; *Ward* v. *Hunter*, 6 Taunt. 210; *Jones* v. *Moore*, 5 Binney, 573.

April term 1834.

Shaw C. J. delivered the opinion of the Court. There is now no class of cases brought before the Court, attended with greater difficulties than those which involve the true construction of the statute of limitations. Although this statute was adopted at a comparatively recent period, in this commonwealth, yet being in nearly or precisely the same terms with the *St.* 21 *Jac.* 1, *c.* 16, the judicial constructions put upon that statute by the English courts, have ever been freely resorted to as the safest guides in the exposition of the various provisions of our own statute. But so various have been the views of the nature and purposes of this statute, which have at different times prevailed, both in England and this country, that the decisions are now found to be in great perplexity, and indeed it is quite impossible wholly to reconcile them. In England it has been attempted to remove some of the difficulties with which the subject has become entangled by conflicting decisions, by *St.* 9 *Geo.* 4, *c.* 14, (Lord *Tenterden's* Act,) by which it is, among other things, enacted, that no acknowledg-

Digitized by Google

ment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take a case out of the operation of the statute, unless such acknowledgment or promise be contained in some writing to be signed by the party chargeable thereby. This enactment will probably remove some of the difficulties which have surrounded the subject; because, although the statute does not attempt to define, what species or form of acknowledgment shall be sufficient to found a new promise, yet when parties are compelled to rely upon written acknowledgments, framed for the express purpose of renewing and continuing a promise which has expired, or is about expiring, such acknowledgment may reasonably be expected to be so definite in its reference to the debt, security, or promise intended to be continued in force, and so precise and explicit in its terms of acknowledgment, as to dispel much of the obscurity, which has surrounded other cases, arising upon loose, indefinite and unguarded verbal admissions. In the state of perplexity in which the law still remains in this country, I consider that the Court are called upon to proceed with extreme caution in deciding each particular case, to select among conflicting authorities, those which appear to be best supported by principle, lest by attempting to proceed upon new and plausible grounds to extricate ourselves from present embarrassments, we may go counter to established principles, and thus increase instead of removing existing difficulties.

Before considering the effect of the statute of limitations, it is proper to inquire what the nature of the contract is, to which it is proposed to apply it in the present case, and the relations in which the parties stand to each other.

The note is the joint and several promise of the three makers, who were all equally responsible to the promisee by force of their original contract; for, although one was designated as principal, and the others as sureties, this designation is rather intended to indicate the relation, in which the promisors stand to each other, than to affect their obligation to the promisee. It is intended to enable the surety to have his remedy over, if called on to pay, and to protect him from a claim for contribution, if the payment is made by the principal.

Digitized by Google

Sigourney v. Drury.

The promisors were never partners, except so far as the signing of this joint note made them so. No question therefore can arise, as to the effect of the acknowledgment of one, to bind others, before and after dissolution of partnership; a question which has had much influence in other cases. Here the interest was paid annually at the expiration of each year, up to the one next preceding the time at which the principal failed; it was paid, therefore, long before any question could be supposed to arise, respecting the effect of the statute of limitations to bar the holder of the remedy, and may be considered as paid in the ordinary course of business, so far as it may be deemed the ordinary course of business to continue the payment of interest periodically, on a note overdue.

At all events, we must consider the payments as made in good faith, that is, with the plain and direct purpose of satisfying the interest due to the holder, and not for the purpose of obviating the effect of the statute, and making evidence, to establish the note as a continuing promise.

The Court are of opinion, in the present case, that the statute of limitations does not afford a good defence to the present action. In stating the grounds of this opinion, it is not my intention to review the numerous cases, cited in the full and elaborate argument of the cause at the bar, but simply to state the grounds of the opinion in this precise case. And considering the difficulties of the general subject, I must beg to be considered as giving no opinion upon many of the questions, incidentally discussed by way of analogy and illustration, and reserve the unrestrained right of reconsidering those questions, upon their particular merits, as they shall occur.

The general rule, as I now consider it settled, is, that to avoid the operation of the statute, it must be shown that the defendant promised within six years next before the commencement of the suit, and if it appear that more than six years have elapsed since the making of the original promise, or since the cause of action thereon accrued, it must appear that the defendant has made a new promise to pay, within the six years. Such promise may be express or implied, and a jury will be authorized, and it will be their duty, to infer such promise from a clear, unconditional and unqualified admission of the existence

Digitized by Google

of the debt, at the time of such admission, if unaccompanied with any refusal to pay, or any declarations indicative of an intention to insist on the statute of limitations as a bar; and it will be the duty of the jury, in like manner, to infer such new promise from a part-payment of the debt within the six years, either of principal or interest, such payment of part being of itself an unequivocal admission of the continuing existence of the balance of the debt, and forming a new point, from which the statute term will begin to run. *Bangs* v. *Hall*, 2 Pick. 368; *Hunt* v. *Bridgham*, 2 Pick. 581.

To this extent the law seems clearly settled; but the question is, whether an acknowledgment or payment by one of several partners or joint debtors, can take the debt out of the statute, as to others; a case which has been much doubted and controverted.

In *White* v. *Hale*, 3 Pick. 291, the point was expressly ruled, that an acknowledgment by one of several joint debtors, is sufficient to take the case out of the statute, as against all. But this case was decided before many of the late cases and discussions on the subject; the authorities were not fully reviewed; and though in ordinary cases such an authority would seem quite decisive, yet perhaps under the very peculiar circumstances in which this question now stands, the Court might still be inclined to reconsider it, as a question not definitively settled. But we think a regular payment of annual interest, for a series of years, before any question of the operation of the statute could arise, by the principal debtor, upon a plain promissory note given originally for a loan of money, such payment being made by the party from whom payment would be expected, and in the ordinary course of business, stands upon a very different footing from that of a mere verbal acknowledgment.

And we consider it a material circumstance, that the payment was made before the statute took effect, and do not mean to give any opinion, as to the effect of payment of interest or principal by one, to affect the liability of others, after the parties are in fact exonerated by lapse of time and the operation of the statute. There is an obvious difference between the effect of a payment within the term, which shall *continue* an

Digitized by Google

Sigourney v. Drury.

existing liability in force, and such payment made after the liability is barred, to *revive* and create a new liability.

The case of *Whitcomb* v. *Whiting*, 2 Doug. 652, is the foundation of the principle, since frequently acted on, that the acknowledgment of one binds all. I am aware that this case has been doubted, and I therefore do not cite it as an authority, except so far as it has been corroborated by the cases in which it has been called in question, as an authority for the general doctrine of the binding effect of an acknowledgment. The case was like the one at bar in this respect, that the operation of the statute as to all, was avoided, by proof of payment of interest by one. The court held that that was sufficient to take the case out of the statute, there being no suggestion of collusion. Lord *Mansfield*, in giving the opinion of the Court, went further than the decision of the case required, and stated that an admission by one was an admission by all. The last remark was no part of the case decided, and it is this which has been doubted. Another observation made by the same eminent judge, points to the distinction between the fact of a payment, and a mere verbal acknowledgment. Payment by one is a payment for all, and enures to the benefit of all.

Brandram v. *Wharton*, 1 Barn. & Ald. 463, is one of the modern cases, in which the authority of *Whitcomb* v. *Whiting* was questioned, and indeed has been relied upon as the case in which the latter has been overruled. In *Brandram* v. *Wharton*, Lord *Ellenborough* alludes to *Whitcomb* v. *Whiting*, as the case with which this doctrine of rebutting the statute, by an acknowledgment, other than that of the party himself, began. "By that decision," says he, "where however there was an express acknowledgment by the actual payment of a part of the debt, by one of the *parties liable*, I am bound." He then comments upon that case as an authority for the general principle of an acknowledgment being sufficient, and certainly doubts it, and gives strong reasons against it, and declares a disinclination to go beyond that case.

In *Jackson* v. *Fairbank*, 2 H. Bl. 340, it had been held, that a part-payment made by the assignees of one party, who had become bankrupt, would be a payment sufficient to avoid

Digitized by Google

the operation of the statute, as to other parties. Lord *Ellenborough* in citing it in *Brandram* v. *Wharton*, speaks of it with disapprobation, and says that it wanted one material circumstance that existed in *Whitcomb* v. *Whiting*, for in the latter case, the party who revived the debt by his acknowledgment, became liable to contribute to it, whereas in the case of assignees, the acknowledgment, besides being a constructive one, was made by parties who never could be called on for contribution. *Bayley* J. relies upon the same circumstance, and says the cases cited of *Whitcomb* v. *Whiting* and *Wood* v. *Braddick* 1 Taunt. 104, go upon the principle, that the party who was jointly liable, made the acknowledgment against his own interest.

The authority of *Whitcomb* v. *Whiting* was again considerably discussed in the case of *Atkins* v. *Tredgold*, 2 Barn. & Cressw. 23. It was an action against the executors of a testator who had been dead eleven years. The testator was a surety, and father of the surviving promisor, and the latter was executor. He paid interest within six years. At the trial, it was left to the jury to find, whether he paid on his own account as promisor, or as the executor of his father. The jury found that he had paid on his own account. The court held, that this was not sufficient to take the case out of the statute of limitations, as against the executors of the father. *Abbott* C. J. distinguished it from the case of *Whitcomb* v. *Whiting*, by saying that in that case, the payment was by one of several originally liable. And *Bayley* J. says, that case is distinguishable from the present in two particulars; 1. here the statute appears to have attached before the payment was made by Robert Tredgold, the executor, and therefore John Tredgold, being at that time protected, could not be subjected to any new obligation by the act of Robert; and 2. the parties sought to be charged in this action, by means of an implied promise, are not those originally liable, as was the case of *Whitcomb* v. *Whiting*.

Now in the case under consideration, both these circumstances are the other way, so that the case of *Atkins* v. *Tredgold* is not an authority against the view we take, nor against the authority of *Whitcomb* v. *Whiting*, so far as it ap-

Digitized by Google

Sigourney v. Drury.

plies to the present case. In the case at bar, the payment was made before the statute attached; and it was made by one of the parties originally liable, and who by this payment continued the contract in force for the extended period, as well against himself, as against the other parties liable.

But the subject again came before the court, in a more recent case, *Perham* v. *Raynal*, 2 Bingh. 304, in which it was held, that an acknowledgment within six years, by one of the joint makers of a promissory note, will revive the debt against the other, although he has made no acknowledgment, and only signed the note as surety. It does not appear by the brief statement of the facts in this case, whether at the time of the promise relied upon, the statute had attached upon the note or not; nor do the court seem to rely upon that distinction in deciding the case. *Best* C. J., in commenting upon the statute, and saying that from the words of the statute one might be led to conclude, that in no instance could a remedy for debt be had after six years, adds, but that construction cannot be adopted, because if it were, the party might elude paying the principal, although he had paid interest for six years. He puts it upon the ground, that it is not a new contract, but the revival or continuance of an existing contract, and upon the rule of evidence, that in respect to a joint interest or joint contract, the act or declaration of one is binding upon all. In this case the decision in *Whitcomb* v. *Whiting* was considered as a good authority.

This case is directly in point, and in my judgment goes somewhat further than the principle involved in the case at bar, inasmuch as it was the case of an acknowledgment, and not of an actual payment.

But a more recent case is still more directly in point, that of *Burleigh* v. *Stott*, 8 Barn. & Cressw. 36, decided as late as Easter term 1828. To an action upon a joint and several promissory note of Thomas Burleigh and Thomas Stott to Robert Burleigh, Stott being a mere surety, brought by the executor of Robert Burleigh against the administrator of Stott, the statute of limitations was pleaded. It appeared that Thomas Burleigh had paid the interest for two years, and made a payment on account of the principal, in the lifetime of the par-

Digitized by Google

tes, and that the last payment was made within six years next before the commencement of the suit. The opinion was delivered by Lord *Tenterden*, that the plaintiff was entitled to recover. He says, "I quite agree with the late decisions, which have established, that in order to satisfy the statute of limitations, there must be evidence of a promise to pay within six years. But I think there was sufficient evidence in this case, of a promise by the intestate within six years, to pay jointly and severally, according to the form of the note." *Bayley* J. added, "I consider this as a joint and several promissory note, and I think that the part-payment by one operates in point of legal effect as a new promise, by all and each of the promisors, to pay according to the nature of the instrument."

Such was the state of the law, upon judicial decisions, at the time when Lord *Tenterden's* act was passed on May 9, 1828.

By this statute already cited, it was enacted that no promise or acknowledgment should be effectual, unless made in writing and signed by the party chargeable thereby, but with this *proviso*, that nothing therein contained should alter, or take away or lessen the effect of any *payment* of any principal or interest, by any person whatever.

It is remarkable, that this act, as it passed, varied essentially from the original bill, in which it stood thus:—that where there shall be two or more joint contractors, or executors or administrators of any joint contractor, no such joint contractor, executor, &c. shall lose the benefit of the said enactments (the statutes of limitation) or either of them, so as to be chargeable in respect or by reason of any acknowledgment or promise made by any other or others of them, *or by any payment made by any other or others of them, unless such payment shall be proved to have been made, with his or their privity or concert, &c.* These words, requiring proof that such payment was made with the privity and concert of the others, were struck out, and not adopted as part of the act.

The effect of the proviso, in this very important and well considered act, is to leave the legal effect of a *payment*, made *by any person*, in taking a case out of the operation of the

Digitized by Google

Sigourney v. Drury.

statute of limitations, just as it was before. Where therefore this effect is to be produced by a mere promise or acknowledgment, the statute not only requires that such acknowledgment or promise should be in writing, but it further requires that such written instrument should be signed by each party to be charged thereby, which will effectually preclude the revival of a promise by one against any other than himself, by an acknowledgment. But where the same effect is to be established by the act of payment, of principal or interest, there the law stands as it did before; and it being shown by the cases cited, that a payment by one jointly liable, would take the case out of the statute as to others jointly liable, before the statute, the law is the same still.

This statute is of no other force or importance here, than to show what was the history and state of the law on this subject, before the statute, and how it was understood by eminent jurists. In this respect it is important, as indicating the legal effect of a payment, by one joint debtor or promisor, in continuing a contract in force and preventing the operation of the statute, in regard to others.

In a note, in a late treatise, Wilkinson on Limitations, 87, I find a brief report of a case said to have been decided by Lord *Tenterden*, at nisi prius, after the passing of the statute, in August 1829, *Baldwin* v. *Clarke*, in which it was held, that payment by the executors of one of two joint makers of a promissory note, would bind the other maker. I have not been able to find a more extended report of this case. It is important as having been decided by Lord *Tenterden* since the act, and if correctly reported, it goes to the whole extent of the doctrine relied upon in the present case.

One other case has occurred since the statute, which I had not examined before drawing up this opinion, which appears to me most fully and entirely to support the views already taken, especially as to the effect of payment. *Wyatt* v. *Hodson*, 8 Bingh. 309, decided as lately as Trinity term 1832 The point decided is, that payment of interest by one of several joint contractors, takes a debt out of the statute of limitations as against all. This also was an action upon a joint and several promissory note, which one had made as surety with

Digitized by Google

his brother. *Tindal* C. J. gives the reasons why the case of payment should be distinguished from the case of acknowledgment, by the statute leaving a payment to its legal operation, to bind all the joint promisors, and confining the effect of an acknowledgment, to him who makes it; because the payment of principal or interest stands on a different footing from the making of promises, which are often rash, or ill-interpreted, while money is not usually paid without deliberation; and payment is an unequivocal act, so little liable to misconstruction as not to be open to the objection of an ordinary acknowledgment. The other members of the Court (*Park*, *Gould* and *Alderson*) concurred generally, considering *Whitcomb* v. *Whiting* as a governing authority, notwithstanding some observations thrown out against it, and as being recognised and confirmed, by *Burleigh* v. *Stott*, and *Perham* v. *Raynal*. This case is precisely in point, and we think is supported by a great weight of authority and founded upon sound principles of law.

We have not overlooked the case of *Bell* v. *Morrison*, in the Supreme Court of the United States. 1 Peters, 351.

That case however is extremely distinguishable from the present. It was a case of a mere acknowledgment, by a partner, after the dissolution of a partnership, after the statute of limitations had attached, so that the other partners were already discharged by the operation of the statute, and where the account was wholly unliquidated. It was a case also to some extent influenced by the local laws of Kentucky. And the court state that the question was not, as to the authority of a partner after the dissolution to adjust an admitted and subsisting debt; meaning, admitted by the whole partnership or unbarred by the statute; but whether he can by his sole act, after the action is barred by lapse of time, revive it as against all the partners, without any new authority communicated to him for that purpose. The question in the case before us, differs in every essential particular. It is the case of a joint promise, for a precise, liquidated sum, where payment of part is *de facto* an admission of the existence of the debt for the balance; it is the case of a payment of interest, before the statute attached, and before the debt was barred; and in all these par-

Digitized by Google

Sigourney v. Drury.

ticulars, considered essential in *Bell* v. *Morrison*, is a case wholly distinguishable in principle.

Some reliance was placed in the argument, upon the fact, that the defendant who pleads in the present case, was a surety, and the consideration of hardship was strongly pressed upon the Court. We have already remarked, that on a joint and several note, as to the promisee, all are principals. The case of *Hunt* v. *Bridgham* in Massachusetts, and most of the English cases cited, were those of sureties, and yet that circumstance was considered as making no difference upon the question of legal liability. And why should it? If the holder gives no new credit to the principal, it is always in the power of the surety to inquire and ascertain whether the debt is paid, and if not satisfied to let the note remain unpaid, he may pay it, and call on his principal for reimbursement. But if he is content to lie by, and make no inquiry, where is the hardship in calling upon him to perform the contract which he has made? When a note is given with a surety, it indicates that the promisee wishes and means to have security; it indicates, that it is intended for the accommodation of the principal; and with a view to such accommodation, it may reasonably be expected that it will continue beyond the particular time stipulated; and the law binds all parties till payment. If the surety does not mean to remain responsible beyond the precise time limited, he may put his suretiship into the form of an indorsement, and then if the note is not paid at maturity, he will know it or be discharged.

On the whole, we are of opinion, that the facts agreed by the parties are sufficient to maintain the issue for the plaintiff, and therefore, according to the agreement of the parties, there must be a judgment for the plaintiff.

Digitized by Google

PETER FAY *et al. versus* JESSE CHENEY.

If a testator, after the making of his will, takes a bond and mortgage, and enters for condition broken, but dies before foreclosure, the heirs at law are not entitled to the mortgaged premises as real estate purchased subsequently to the making of the will, but the debt goes to the executor as personal estate, and he may collect it or may assign it together with the mortgage.

WRIT of entry. The demandants claim title to the land as heirs of Alpheus Fay.

Upon a case stated it appeared, that before June 16, 1827, Alpheus Fay made his will, by which he devised to Fitch Winchester, his heirs and assigns, "all the rest and residue of his estate, real, personal and mixed," and appointed Winchester his executor.

On June 16, 1827, one Cook mortgaged the demanded premises to one Onthank, to secure the payment of the sum of $500, one half in one year, and the residue in two years, according to the condition of a bond binding the mortgager to these payments. On October 22, 1827, Onthank assigned the bond and mortgage to the testator. In July 1829, the testator entered and took possession of the premises under the mortgage, for condition broken, and continued to hold possession thereof until his decease, which took place on October 31, 1830. On August 29, 1831, Winchester, by his deed, as executor, assigned the bond and mortgage to the defendant, who thereupon entered into possession of the premises.

On September 25, 1829, the mortgager conveyed the equity of redemption to one Bigelow, by whom it was conveyed on January 26, 1831, to Onthank. On June 12, 1832, Onthank quitclaimed and assigned all his interest in the premises to the defendant.

The plaintiff was to be nonsuited, or the defendant to be defaulted, according to the opinion of the Court upon these facts.

Newton and *Lincoln* for the plaintiff. The interest of the testator in the premises, after entry for condition broken, was real estate, and as it was acquired after the making of his will, did not pass to Winchester by the devise, but descended

Oct. 4th

Digitized by Google

Fay v. Cheney.

to the plaintiffs as the heirs of the testator. Trowbridge's Reading, 8 Mass. R. 554; *Smith* v. *Dyer*, 16 Mass. R. 18; 2 Powell on Mortg. (Rand's ed.) 423; *Astor* v. *Hoyt*, 5 Wendell, 603; *Williams* v. *Bosanquet*, 1 Brod. & Bingh. 238. If the interest of the testator in the premises before entry for condition broken, would have passed by the devise, his entry was an alteration of the estate which operated as a revocation. *Ballard* v. *Carter*, 5 Pick. 112; *Sparrow* v. *Hardcastle*, 3 Atk. 798; *Marwood* v. *Turner*, 3 P. Wms. 166; *Abney* v. *Miller*, 2 Atk. 593; 1 Powell on Mortg. (Rand's ed.) 110.

Merrick and *Kinnicutt*, for the defendant, cited 1 Cruise's Dig. 110; *Ellis* v. *Guavas*, 2 Ch. Cas. 50; *Goodwin* v. *Richardson*, 11 Mass. R. 469; *Bolton* v. *Ballard*, 13 Mass. R. 227; *Parsons* v. *Welles*, 17 Mass. R. 419.

April term 1834.

SHAW C. J. delivered the opinion of the Court. This case involves such a variety of persons and dates, that it seems complicated; but I believe that a close examination and distinct understanding of these particulars, will render the case exceedingly clear.

The plaintiffs claim as heirs at law of Alpheus Fay; the case shows that he made his will and gave the residue of all his property, real, personal and mixed, to Fitch Winchester, and made him executor. After the execution of this will, he acquired by assignment the mortgage in question, being a mortgage previously made by Cook to Onthank. Alpheus Fay, the assignee, during his lifetime, entered for condition broken, but died before the three years elapsed.

Now the demandants contend, that as this mortgage was acquired by assignment, by their ancestor after making his will, so far as the assignment vested a fee in the testator, it was after-purchased estate, and did not pass by his will, but vested in his heirs at law. That real estate acquired by descent or purchase, after the making of a will, does not, without republication, pass by the will, but descends to the heirs, is a very clear principle of law; but it will go very little way towards aiding the demandants in this suit.

The law of mortgage in this commonwealth, is a mixed system, derived partly from the common law in regard to real property, partly from the rules and maxims of the English

Digitized by Google

courts of chancery, but principally from various statutes. Until condition broken, the rights of the parties are considered legal; the mortgagee is deemed to be seised of a defeasible estate, and upon performance of the condition by the payment of the money due, within the time limited, or doing such other act as the condition provides, the estate is defeated by force of this condition and revests in the mortgager. But after condition broken, payment of the money is not a strict performance of the condition, and by mere force of the condition the estate at law is not defeated by this act. It may require a release or some other act of the mortgagee to revest the estate. Such a release, mortgagees and their heirs are bound by statute to give, and are rendered liable to an action on the case for special damages, if they refuse, with treble costs; *St.* 1783, *c.* 37, § 6; or a bill in equity may be sustained. But it is manifest, that the only real purpose for which a mortgage is made, is to secure the debt; and when the debt is paid, the whole substantial purpose is accomplished; a mere naked seisin, without any beneficial interest, remains in the mortgagee; the legal seisin, which he holds, results solely from the application of a strict technical rule of law, and any technical answer to a claim thus founded, is good.

Here, although the legal seisin acquired by Alpheus Fay, by the assignment of the mortgage, did not pass by his will previously executed, yet the debt secured by it did pass by the will as a will of goods. Remaining his personal property at the time of his decease, his executor had a perfect right to collect it or assign it, and the proceeds, when collected or assigned, passed by force of the will to the residuary legatee.

Now, to pursue the facts of this case a little further, it appears that the executor of Alpheus Fay did assign this mortgage to the defendant, and at least therefore the right to the debt vested in the defendant.

It appears, also, that he acquired the equity of redemption. The mortgager is deemed to be the owner of the estate, subject only to the mortgage. The equity of redemption is the estate, charged with the incumbrance. Except as to the mortgagee, the owner of the equity is the owner of the estate.

From the case it appears, that Cook, the original mortgager,

Digitized by Google

Fay v. Cheney.

long before foreclosure, conveyed his right of redemption to Bigelow, that Bigelow conveyed the same to Onthank, and that Onthank quitclaimed and assigned the same to Cheney, the defendant.

The defendant therefore became substantially the owner of the estate, subject only to the mortgage, and by becoming the purchaser and assignee of the debt secured by the mortgage, if there was not an extinguishment of the mortgage, at least nothing remained but the naked legal seisin, without any beneficial interest.

Then the question recurs, had the demandants such a seisin, and can they enforce it in an action at law.

It is unnecessary to decide, in case a mortgagee has entered for foreclosure, but not foreclosed at the time of his death, whether by force of the *St.* 1788, *c.* 51, the legal seisin vests in the heir or executor. We shall see hereafter, that if a suit is to be brought, it must be done by the executor. But supposing the legal seisin did vest in the heir, we are of opinion, that in the case before us the heirs cannot have judgment.

It is not necessary now to consider, what the effect would be if the parties were reversed, if the demandants were in possession of the mortgaged premises, and the defendant were seeking his remedy. But the facts imply, and the case supposes, that the defendant is in possession, and the demandants are seeking, by force of their supposed legal title, to obtain possession. Under these circumstances, the statute provides, that the judgment shall be conditional, that if the mortgager shall pay the mortgagee, his executors &c., such sum as the court shall adjudge to be due, within two months, the mortgage shall be void and discharged, otherwise the plaintiff shall have his writ of possession. *St.* 1785, *c.* 22, § 1. This implies that the court shall inquire and determine the amount due, and make that a part of the judgment. And if there is nothing due, there can of course be no conditional judgment. If it be said that this was probably not contemplated by the statute, it is probably true; but it is also probably true, that it was never contemplated by the makers of the statute, that any action should be brought by the mortgagee, after the actual or virtual payment of the debt secured by the mortgage. The

Digitized by Google

scope and whole tenor of these statute provisions, imply, that the remedies designed for the mortgagee, were such as to enable him to obtain the payment of the debt, or an indefeasible title to the estate pledged for its security, but not both.

It is a settled rule under the statutes upon this subject, that if a mortgagee has occasion to sue, after condition broken, he is entitled to no other judgment than the conditional one; and if the mortgagee declares on his own seisin generally, still the mortgager, or the tenant standing on the right and in the place of the mortgager, may show the qualified seisin of the demandant, and insist on the benefit of a conditional judgment. *Wade* v. *Howard*, 11 Pick. 289.

But there is another view of this subject, leading to the same result, which appears to me to be equally decisive. This action is brought by the heirs of the assignee of the mortgage. The statute already cited, *St.* 1788, *c.* 51, was designed, among other things, to remove doubts as to the interest, title and estate which executors and administrators have in the lands mortgaged to their testators or intestates, and it provides, that when such mortgagee shall decease, before recovery of seisin and possession of the lands mortgaged, they shall be assets, as personal estate &c., and executors or administrators may bring actions for the recovery of seisin and possession, in which actions it shall be sufficient to declare on the seisin and possession of the testator or intestate. It may be doubtful, upon the construction of the statute, whether the provisions in respect to the mortgagee's dying before the recovery of the seisin and possession of the mortgaged premises, means before foreclosure, or before entry to foreclose. The obvious purpose of the statute would require the former construction. The entry to foreclose does little or nothing to change the relative rights of the parties. It fixes the commencement of a term of three years, the lapse of which, by force of law, if the estate be not redeemed, will work a foreclosure. But the foreclosure itself effects an entire change. The lien is converted into an estate; the pledge is changed into an irredeemable and indefeasible interest; the debt is paid and extinguished by an absolute transfer of the estate; in full, if the estate is of sufficient value, or *pro tanto*, if the value be insufficient. It is the foreclosure

Digitized by Google

Fay v. Cheney.

and not the entry to foreclose, which effects this transmutation and substantially changes the mortgage from the personal to the real property of the mortgagee. It would seem, therefore, that this was the event contemplated by the statute, as that which would change the destination of the property, from the executor to the heir, and would follow out the general analogy of the law, which upon the decease of the proprietor, gives the real estate to the heir, and the personal to the executor or administrator. But whether the true construction of the statute would go to this extent or not, the constructions which it has judicially received, are sufficient to decide this action.

In *Smith* v. *Dyer*, 16 Mass. R. 18, it was decided, that the heirs of a mortgagee have not such an interest in mortgaged estate, as entitles them to enter, or to have an action for condition broken. This decision was founded on the construction of the statute.

In *Dewey* v. *Van Deusen*, 4 Pick. 19, the same decision was made, in a case where the mortgagee had entered in his lifetime, and died before foreclosure. This circumstance was relied on, in argument, to distinguish the case from the principle settled in *Smith* v. *Dyer*, and requiring a different rule under the provisions and construction of the statute. At first, the judge at nisi prius thought that this circumstance did make a difference and took the case out of the operation of that provision of the statute, which gives the action to the executor or administrator, and he reserved the point upon that ground, so that the attention of the Court was called directly to that point. But upon argument and consideration, the same judge, with the whole Court, were of opinion, that where the mortgagee had entered to foreclose, but died before foreclosure, the executor alone, and not the heir, must bring the action, if there be occasion to bring one.

That case is exactly in point. Here the mortgagee entered to foreclose and died. The defendant, by various mesne conveyances, acquired the equity of redemption and stood in the place of the mortgager, when the suit was brought. If, therefore, the debt remained unpaid, and there were occasion to bring an action, it must be brought by the executor, and could not be maintained in the name of the heirs.

Demandants nonsuit.

Digitized by Google

JOSEPH FIELD, Appellant &c., *versus* DANIEL HITCHCOCK, Executor.

It is not competent for a court of probate to decide, that an account of an executor is final, so as to bar all further inquiry in regard to matters not included in the account, and to oust the court of probate of its jurisdiction.

An executor is not liable to be called to account a second time, for the same matter, but, in order to protect himself from future liability, he should specify the subjects in regard to which he settles an account, and the decree of the court upon such specific subjects, will be conclusive against all parties, unless fraud be charged and proved.

APPEAL from a decree of the judge of probate. It appeared, that the appellant, a residuary devisee and legatee of Joseph Field deceased, on June 21, 1832, presented a petition to the judge of probate, which alleged, that although the appellee, as the executor of the will of the deceased, had settled three several accounts in the probate office, yet that a large amount of the property of the testator still remained in his hands, of which he had rendered no account; wherefore the appellant prayed that the appellee might be cited to render and settle a further account. A citation was accordingly issued.

At the September term of the court of probate in 1832, a decree was passed, by which, after reciting that it appeared, that the appellee had settled his final account after due notice to the appellant, and with his acquiescence in its correctness, signified by his countersigning the same, it was adjudged, that the appellee be no further holden to answer to the representation and complaint of the appellant.

The appellant thereupon appealed, and assigned the following reason: —

Because the court of probate decreed, that the appellee, having settled three accounts, should not be held to render any further account, or render any reason for refusing to do so; although it was alleged and offered to be proved by the appellant, that there remained certain large sums of money still unaccounted for by the appellee, as specified in a bill of particulars which was filed.

Merrick and *Bliss*, for the appellant, cited *Paine* v. *Stone*, *Oct. 5th*

Digitized by Google

Field v. Hitchcock.

10 Pick. 75; *Jenison* v. *Hapgood*, 7 Pick. 1; *Saxton* v. *Chamberlain*, 6 Pick. 422; *Paine* v. *Fox*, 16 Mass. R. 129.

J. Davis and *Washburn*, for the appellee, cited to the point, that the final account of the appellee, which was countersigned by the appellant, was conclusive and could not be opened unless fraud were specifically charged and proved, *Saxton* v. *Chamberlain*, 6 Pick. 426; *Jenison* v. *Hapgood*, 7 Pick. 7; Toller on Executors, (4th edit.) 495; *Bush* v. *Sheldon*, 1 Day, 170; 5 Dane's Abr. 269; *Potter* v. *Webb*, 2 Greenl. 257; and to the point, that if there was any property in the appellee's hands unaccounted for, the appellant's remedy was on the probate bond, *Boston* v. *Boylston*, 4 Mass. R. 323.

April term 1834.

Shaw C. J. delivered the opinion of the Court. On an appeal from a decree of the judge of probate, the question is, whether the settlement of a former account by an executor can be pleaded as a final account, so as to secure him from rendering a further account when cited for that purpose, and not only preclude the probate court from any further adjudication, but from all further inquiry. The Court are of opinion, that it was not competent for the probate court to decide that any account of the executor was final, so as to bar all further inquiry in regard to matters not included in the accounts already settled, and to oust the probate court of its jurisdiction. An account is not in its nature final, whilst the executor continues to hold his office, because he may continue to receive and collect assets of the estate, many years after the settlement has been apparently closed. Instances of this have recently occurred, where administrators have received amounts allowed under treaties of foreign governments, making indemnity for long antiquated claims. And further, a knowledge of facts may come to parties interested, tending to charge an executor, after he has settled an account, but which account has not embraced the subject matter of such charge. It was said in argument, as a reason why the executor should not be held further to answer, that he had accounted for all the property embraced in the inventory. This reason is plainly insufficient, because an executor is not only held by the duty of the office, but by the express terms of his bond, to account as well for property not embraced in the inventory, as for that which is.

Digitized by Google

And, indeed, the very reason why he may be called at a late period to account, may be, that property has come to his hands which ought to be accounted for, but which did not come to the knowledge of the parties interested, because the executor failed in his duty, in not putting it into the inventory.

It was further insisted, and authorities were cited to support the position, that nothing but fraud will justify opening a final account, and that such fraud must be specifically charged. But a final account, in the sense in which it is thus used, is an account embracing the subject, which has been passed and allowed by a final decree of a probate court, of original or appellate jurisdiction. It is the adjudication, which gives to the account the character of a final account.

One of the principal arguments relied upon for the appellee is, that if an executor cannot thus shield himself, he may be liable to be called on *toties quoties*, and can never have a final settlement. But, by the rule suggested, an executor is not liable to be called to account a second time for the same matter, and if he would protect himself from future liability, he should require the party calling for an account, to specify particularly the subjects as to which he requires the executor to account, by examination on oath or otherwise, and then having accounted, the whole would appear by the decree remaining on the records of the court for his protection. Then, if called on again, by the same or another party, such decree upon the specific subjects, would be conclusive as *res judicata*, unless fraud were charged and proved.

Decree reversed, and the case remitted to the probate court for further proceedings.

Digitized by Google

Edward H. Hemmenway *versus* John Wheeler Junior.

The nature of the possession and custody which an officer is to keep, of personal property attached by him, depends upon the nature and position of the property; and in general, it must be such a custody as will enable him to assert his control over the property, and so that it cannot probably be withdrawn or taken by another without his knowledge.

An officer attached a parcel of hewn stones lying in the town of Worcester, on land belonging to the commonwealth, by going among and upon them, and directed the creditor, who had receipted for them, and whose place of business was about fifty or sixty rods distant from where the stones lay, and in sight of a part of them, to take charge thereof; but the stones were not removed. No notice was given to any one, of the attachment, although there were persons at work or residing near, nor was any other mode adopted of giving notoriety to the transaction. A few days after the attachment, a person was summoned as a trustee in the same writ, and the creditor informed him of the attachment, but desired him not to inform any other person thereof, saying that he did not wish to injure the credit of the debtor. It was *held*, that the attachment was valid as against a subsequent attachment made without notice thereof, and that sufficient possession was retained, to continue it in force.

This was replevin for 2486 feet of hewn stones. The defendant pleaded property, at the time of the taking, in Temple & Washburn.

At the trial, before *Morton* J., it appeared that the plaintiff and defendant were deputy sheriffs; that on November 5, 1832, the plaintiff, having a writ in favor of one Howe and others against Temple & Washburn, proceeded to attach the stones in question, which were lying at about the distance of ten rods from the Lunatic Hospital in Worcester, on land belonging to the commonwealth and appropriated to the use of the hospital; that the plaintiff, in making the attachment, went among and upon the stones; that Howe receipted for them; that the plaintiff thereupon directed him to take charge of them, but that they were not removed; that Howe's place of business was distant about fifty or sixty rods from the place where the stones lay, and in sight of a part of them, and his boarding-house was also in sight of them; that there were persons at work upon the hospital, and that the house of John F. Clark was distant about ten or fifteen rods, but that no notice of the attachment was given to them or to any other person, nor any other mode adopted of giving notoriety to the act; that on No

Digitized by Google

vember 15, 1832, one Holbrook was summoned in the same writ as trustee of Temple & Washburn, and was informed by Howe, that the stones were attached, and that no one knew of it except Howe and the plaintiff; that Holbrook was desired to communicate information of the attachment to Temple & Washburn, and to tell them, that the action might be settled before the expiration of the time of service and the public would have no knowledge of the transaction; and that Howe requested Holbrook not to inform any other person of the transaction, saying that he did not wish to injure the credit of Temple & Washburn.

It further appeared, that on December 1, 1832, the defendant, after inquiring of Clark, whose residence was nearest to the stones, whether they had been taken by any of the creditors of Temple & Washburn, and not deriving any knowledge from him or otherwise of any existing lien thereon, attached them upon a writ in favor of one Sherman against Temple & Washburn; that Clark and one Henry, who resided in the same house, were employed by the defendant to take care of the property attached; and that a few weeks after the attachment made by the defendant, Howe gave notice to Clark, of the plaintiff's attachment.

Merrick and *Kinnicutt*, for the plaintiff, cited *Baldwin* v. *Jackson*, 12 Mass. R. 131; *Train* v. *Wellington*, 12 Mass. R. 495; *Bridge* v. *Wyman*, 14 Mass. R. 190; *Bagley* v. *White*, 4 Pick. 395; *Ashmun* v. *Williams*, 8 Pick. 402. *Oct. 5th.*

C. Allen and *Towne*, for the defendant, cited *Bagley* v. *White*, 4 Pick. 395; *Bridge* v. *Wyman*, 14 Mass. R. 190; *Denny* v. *Warren*, 16 Mass. R. 420; *Gordon* v. *Jenney*, 16 Mass. R. 465; *Baldwin* v. *Jackson*, 12 Mass. R. 131; *Train* v. *Wellington*, 12 Mass. R. 495.

SHAW C. J. delivered the opinion of the Court. If any question of fraud were intended to be raised in the present case, if it were contended that the plaintiff had designedly concealed his attachment with a view to defraud other creditors, that fact should have been put in issue and tried by a jury. The question therefore is, whether the prior attachment made by the plaintiff, was sufficient to bind and hold the property against the after attachment made by the defendant. *April term 1834*

Digitized by Google

Hemmenway v. Wheeler.

The evidence shows that there was a sufficient seizure of these bulky articles, to constitute an attachment. The officer went to the place where the stones were, and upon and among them, declaring that he attached them. *Train* v. *Wellington*, 12 Mass. R. 495.

And we think he remained in the constructive possession in such manner as to continue the attachment in force. Notoriety is not necessary to give effect and validity to an attachment of personal property. It is not necessary to continue an attachment, that an officer or his agent should remain constantly in the actual possession. *Gordon* v. *Jenney*, 16 Mass. R. 465; *Ashmun* v. *Williams*, 8 Pick. 402. [See also *Fettyplace* v. *Dutch*, 13 Pick. 388.] The nature of the possession and custody which an officer is to keep, will depend upon the nature and position of the property, as ships, rafts, piles of lumber, masses of stone, or lighter, more portable, and more valuable goods. In general it may be said, that it shall be such a custody as to enable an officer to retain and assert his power and control over the property, and so that it cannot probably be withdrawn, or taken by another, without his knowing it. Here it is manifest, that the officer did not intend to abandon the attachment, and that the measures which he took, considering the bulky nature of the property and the situation in which it was placed, were sufficient to continue his possession and preserve his attachment.

Defendant defaulted.

Digitized by Google

DANIEL STEARNS *versus* DARIUS RICE.

A tract of land was conveyed by a deed which described it as bounding on a road, and stated the number of acres which it contained. Subsequently the road was discontinued, and a new road laid out, by which a small portion of the tract was separated from the residue. After the new road had been made, the demandant, to whom the tract had been conveyed, mortgaged a tract of land, the deed of mortgage defining the land by bounds, one of which was the road, without stating the length of the lines, and describing the land as the same land which was conveyed in the first mentioned deed and as containing the same number of acres, and referring to that deed for all further necessary description. It was *held*, that the small portion of land so separated by the location of the new road, did not pass by the mortgage deed.

WRIT of entry, in which the demandant claims title to a tract of land in the town of Worcester, containing two acres and one hundred and five rods.

By an agreed statement of facts it appeared, that on January 1, 1782, John Stearns conveyed to Benjamin Lathe one undivided half of a tract of land containing twenty-eight acres, lying in four separate parcels; that one of these parcels, which was bounded southerly and westerly by the county road leading to Mendon, included the demanded premises; that by a subsequent deed the other half of the tract was also conveyed to Lathe; that on April 8, 1795, Lathe conveyed the same tract to the demandant, the deed referring to the deed of January 1, 1782, for a particular description; that on May 3, 1826, the demandant and Daniel Stearns jun., to whom the demandant had conveyed one undivided half of the land, mortgaged a tract of land to Isaiah Thomas, which was defined in the deed of mortgage, by bounds, without stating the length of the lines, and described as "containing by estimation sixty-one acres, and is the same land which was conveyed to Daniel Stearns, by Isaac Flagg, by his deed dated January 1, 1787, recorded &c., and by Benjamin Lathe, by his deed dated April 8, 1795, recorded &c., reference to said deeds to be had for all further necessary description."

It also appeared, that in the deeds of Flagg and Lathe thus referred to, the quantity of land conveyed in such deeds respectively, was estimated at sixty-one acres.

Subsequently to the date of the deed from Stearns to Lathe, but previously to the date of the mortgage deed to Isaiah

Digitized by Google

Stearns v. Rice.

Thomas, the road referred to in the former deed was discontinued, and a new road was laid out, which separated the demanded premises from the main body of the land described. The land mortgaged was described in the mortgage deed to Isaiah Thomas as bounding on the road.

On May 12, 1830, the right in equity of redeeming the mortgaged land was duly conveyed by a sheriff's deed to Thomas Rice, who on May 20, 1831, conveyed the same to the tenant. The tenant entered on the demanded premises and claimed to hold them by virtue of these conveyances.

The demandant, to whom Daniel Stearns jun. had mortgaged his half of the demanded premises, had entered for condition broken before the commencement of this action, and he claimed to recover them, as never having passed by the mortgage deed to Isaiah Thomas.

A nonsuit or default was to be entered, according to the opinion of the Court upon these facts.

Oct. 7th. *Davis* and *Washburn*, for the plaintiff, cited *Pernam* v. *Wead*, 6 Mass. R. 131; 4 Kent's Comm. 455; *Rust* v. *Boston Mill Corporation*, 6 Pick. 170; *Codman* v. *Winslow*, 10 Mass. R. 146; *Tyler* v. *Hammond*, 11 Pick. 193.

Newton and *Lincoln*, for the defendant, cited *Proprietors of Kennebec Purchase* v. *Tiffany*, 1 Greenl. 219; *Lunt* v. *Holland*, 14 Mass. R. 149; *Davis* v. *Rainsford*, 17 Mass. R. 207; *Jackson* v. *Blodget*, 16 Johns. R. 172; *Worthington* v. *Hylyer*, 4 Mass. R. 196; *Keith* v. *Reynolds*, 3 Greenl. 393; *Vose* v. *Handy*, 2 Greenl. 322.

April term 1834. Shaw C. J. delivered the opinion of the Court. If the demanded premises were included in the mortgage deed to Thomas of 1826, then the tenant has the better title; but if not so included, the demandant is entitled to recover. This depends upon the construction of the descriptive part of this mortgage deed, as it applies to the monuments and local objects.

In applying this description to the land, the Court are of opinion, that the demanded premises were not included and did not pass by the deed of Daniel Stearns and Daniel Stearns jun. to Isaiah Thomas. Where there are descriptions in a deed apparently conflicting, the Court will endeavour to recon-

Digitized by Google

cile them if possible; and if not to be reconciled, such part must be adopted and such rejected, as will best carry into effect the intent of the parties, as far as it can be ascertained.

In applying descriptions to local objects, it must be understood that the parties had reference to local objects as they existed at the time the deed was made, unless there is something to control this presumption. The road mentioned in the deed therefore, must be the road as it was in 1826, which separates the premises from the land described; so that it is clear, that by a precise and definite description, the premises were excluded from that part of the description, which designates the land intended to be mortgaged by metes and bounds. And the subsequent words referring to former deeds, "and is the same land which was formerly conveyed" &c., do not necessarily control the former description, and are not necessarily repugnant. It is the same land, but not the whole of the same land. Besides, this was a mortgage, and not a sale of the land by the acre or otherwise, in which case the quantity of land embraced in the description, would be a much more important consideration; and therefore, in looking for the general intent of the parties, there is much less reason to suppose, in a mort gage where a security and not an alienation was contemplated, that a small and detached part of the estate was intended to be included.

Tenant defaulted.

Digitized by Google

ANDREW SIGOURNEY *versus* WILLIAM J. EATON.

Where land is attached simultaneously by two creditors, and is duly levied on under their respective executions, they are each entitled to a moiety of the land, without regard to the relative amounts of such executions; but if such moiety is more than sufficient to satisfy the execution of one of the creditors, the surplus will go to the other creditor.

So, where an equity of redemption is attached simultaneously by two creditors, and sold under their executions, the proceeds are to be divided equally between them, subject to the same restriction.

It seems, that where land is simultaneously attached by two creditors, and executions are issued in their favor respectively, the officer levying under one of such executions may return, that in consequence of such simultaneous attachment, the execution was satisfied only to the amount of one half of the appraised value of the land.

BILL in equity. From an agreed statement of facts it appeared, that the plaintiff and defendant respectively, caused simultaneous attachments to be made, of the real estate of Zebulon Cary; that they entered their actions and obtained judgments; that the execution issued in favor of the plaintiff amounted to the sum of $484·18, and that in favor of the defendant, to the sum of $1602·03; that both executions were levied on a parcel of land of Cary which was not mortgaged, and were apparently returned by the officers to whom they were respectively delivered, as satisfied to the whole amount of the appraised value of such land, which was $175; that Cary's right of redeeming certain mortgaged real estate also was seized and sold under these executions, and in pursuance of an agreement in writing between the present plaintiff and defendant, was bid off by the latter for the sum of $656, to be held by them in proportion to their respective rights acquired by their original attachments of the same; that by virtue of such purchase and agreement, the defendant entered into possession of the premises so bid off by him, and received the rents and profits until the date of the bill; and that he also took the rents and profits of the real estate levied on.

It further appeared, that the defendant offered to pay to the plaintiff, such proportion of the rents and profits as the amount of the plaintiff's execution bore to the whole amount of both executions; but that the plaintiff demanded one half of the amount of such rents and profits.

Digitized by Google

If the Court should be of opinion, that the plaintiff was entitled to one half of the rents and profits, the defendant was to be defaulted; if otherwise, the plaintiff was to be nonsuited.

Oct. 7th.

Barton, for the plaintiff, cited Co. Litt. 21 *a*, and note 126; *Countess of Rutland's case*, 5 Co. 25; *Shove* v. *Dow*, 13 Mass. R. 529.

Newton for the defendant.

SHAW C. J. delivered the opinion of the Court. The Court are of opinion, that as to the land levied on by execution, and also as to the equity of redemption, the parties, by their attachments, took in moieties, without regard to the amount of their respective executions. The principle is this, that each by his attachment obtained a lien on the property in security of his debt, which would be valid for the whole, but for the attachment of the other. But the attachments being simultaneous, as between themselves, neither can claim priority. They hold not in shares or proportion, but *per mie et per tout*, and upon a division, neither can appropriate to himself more than a moiety.

This principle is to be applied, of course, with this qualification, that as the attachment constitutes a lien in security of a debt, if the moiety which either can hold is more than sufficient to satisfy his debt, the surplus will go to the other.

The mode in which the officers returned the levy on their executions, each being apparently returned satisfied to the amount of the appraised value, may cause some difficulty, and indeed the whole subject of simultaneous attachments, is full of difficulties. It would seem, that if the officer returned the whole appraised value of the land, on the smaller execution, it must be deemed satisfaction *pro tanto*; but we are inclined to the opinion, that the officer might have returned, according to the truth of the case, that in consequence of a simultaneous attachment made by another creditor, the creditor in this execution, in legal effect, took a moiety only of the estate levied on, and so, that the execution was satisfied to the amount of one half of the appraised value. But as the parties in this case have agreed upon the facts, without making any technical question as to the form of the return, their respective rights are to be settled upon the principle above stated.

Digitized by Google

WILSON HATTON *versus* SAMUEL ROBINSON.

Where an attorney at law was requested by a debtor to draw up a mortgage deed o his personal property, and the debtor disclosed his purposes in making such a conveyance, either without any particular motive, or in order to remove any scruple that the attorney might have entertained as to the character of the transaction, but no legal advice as to the effect of such conveyance was asked or given, it was *held*, that the testimony of the attorney as to such communications, was admissible.

The attorney, in such case, having drawn up the deed, by which the property was conveyed to a third person to prevent it from being attached by creditors, the deed was executed in the office of the attorney and in his presence; it was *held* that the attorney was not exempted from testifying as to communications made to him by such third person.

TRESPASS for taking two mares, a chaise and chaise harness. The defendant pleaded the general issue, and filed a brief statement alleging that he attached them as the property of David Winch.

At the trial, before *Wilde* J., it appeared, that the plaintiff claimed the property under a bill of sale from Winch. The defendant, to prove the bill of sale fraudulent, offered in evidence the deposition of Samuel Ames Esq., a counsellor at law in Providence. The plaintiff objected to the admission of the deposition, on the ground that Mr. Ames was employed in the transaction testified to by him, as the attorney of Winch and the plaintiff, and that all he knew in relation to it, was communicated to him in that capacity. The only evidence that Mr. Ames was so employed, was the deposition in question.

Mr. Ames, in his deposition, testified that on April 6, 1831, Winch desired him to draw a conveyance of certain property attached to the Fenner tavern stand in Providence, to the plaintiff, to whom he had contracted to sell it; that he accordingly drew the conveyance; that his impression was, that a small portion of the consideration was to be paid very soon, but that the residue, amounting to the sum of $400 or $500, was secured to Winch by the plaintiff's negotiable note indorsed by one Wesson, which note also the deponent drew. The deponent further testified, that on April 30, 1831, Winch again called upon him, and informed him, that he was about to leave Providence with the purpose of residing in the State

Digitized by Google

of New York; that he owed old debts in Massachusetts to a much larger amount than the value of his property; that he also owed a considerable sum in Providence, for which he was recently indebted; that his intention was, to convert what salable property he had, particularly a pair of horses and a carriage or carriages, into money, as soon as he could obtain a fair price for them, and with the proceeds to pay his Providence creditors; and that in the mean time his Massachusetts creditors pressed him, and as soon as he left Rhode Island for New York, would undoubtedly attach and sacrifice his horses and carriage or carriages.

The deponent further testified, that he understood Winch, that he had left them with the plaintiff for sale, with the intention from the proceeds of the sale, to give preference to, and pay his Providence creditors, and that he wished to cover them, as far as possible, from attachment by his Massachusetts creditors; that, on the whole, as Winch had come from Massachusetts poor, and the credits he had obtained in Providence had been the means of his acquiring what little property he had, the deponent thought his preference of his Providence creditors would not be unfair, and accordingly informed him, that he was willing to draw a mortgage deed from him of the horses, carriage or carriages, to any person he might select; that Winch said, that he had perfect confidence in the plaintiff, and that the deponent accordingly drew such a mortgage deed, the consideration of which he thought was between $200 and $300; that there was some delay about the execution of the mortgage, which was to take place in the deponent's office; that the deponent stepped across the street two or three times to the place where the plaintiff was, to hasten his coming for that purpose; that, at these times, the deponent treated the mortgage as wholly fictitious, and spoke of it to the plaintiff as such, and that the deponent understood him, from his words or manner in speaking of the mortgage, or both, to assent, that it was a mere cover; that at last the plaintiff came to the deponent's office, and brought with him a bundle of bank bills, as the consideration of the mortgage; that the mortgage was executed and delivered in the deponent's presence, but the deponent thought that he did not sign it as a witness; that the plain-

Digitized by Google

Hatton v. Robinson.

tiff handed him the bank bills and requested him to count them, that the deponent hesitated at first, but at the reiterated request of the plaintiff took the bills and turned them over for a moment, but was so convinced that the whole affair was illusory, that he did not compute their amount, and handed them back, saying that he supposed or believed the amount was right; and that the deponent was paid for drawing the mortgage, at the time of the execution, by Winch.

The objection to the admission of this deposition was overruled, and the plaintiff thereupon became nonsuit.

If this ruling was wrong, the nonsuit was to be taken off, and a new trial granted; otherwise, judgment was to be rendered on the nonsuit.

The cause was argued in writing.

Merrick and *Bottom* for the plaintiff. That the employment of one in practice as an attorney, for the purpose of drafting a deed or other legal instrument, secures the client against the disclosure of all communications made to the attorney in relation thereto, is clearly determined in England. *Cromack* v. *Heathcote*, 2 Brod. & Bingh. 4; *Gainsford* v. *Grammar*, 2 Campb. 9; *Rex* v. *Withers*, 2 Campb. 579; *Wilson* v. *Rastall*, 4 T. R. 753. Counsel are not only protected for not answering, but they are compelled to be silent, it being a privilege not of the counsel, but of the client. 2 Stark. on Evid. 395; 1 Stark. on Evid. 104. The same rules and principles have been adopted in this country as in England. *Anon.* 8 Mass. R. 370; *Baker* v. *Arnold*, 1 Caines's R. 258. Within these rules the communications from Winch to Mr. Ames very clearly fall. He anticipated an attachment of his property by his Massachusetts creditors; and the precise object which he had in view, was the mode in which he might, with the greatest facility, avoid such legal claims. He was endeavouring to prepare himself for suits which he anticipated were about to be commenced.

Where counsel are consulted as to what will be the legal effect and consequences of any particular instrument of conveyance, they are as much guarding the rights of their clients and protecting their property, as when litigation is actually in progress; and communications made by clients, in both cases, are

Digitized by Google

entitled to the same privileges. The current of the decisions, and all the elementary treatises, put the rule strictly on the ground of *professional consultation*. They do not limit it to consultations on questions in actual or immediately contemplated litigation. It is the *character* of the communication, which is to be considered. If the attorney is not applied to in his official character, the law implies no confidence, and the attorney then stands like all other men; but if advice is solicited, then the rule applies. Lord *Tenterden*, in *Bramwell* v. *Lucas*, 2 Barn. & Cressw. 743, cited by the defendant, says that "a question for legal advice may come within the description of a confidential communication, because it is part of the duty of an attorney, in that capacity, to give advice." This is the very rule of which the plaintiff desires to avail himself. Winch wished to prefer his Providence creditors to his Massachusetts creditors; he consulted his counsel on the sufficiency of a particular step to accomplish that object; and certain measures are adopted, as the result of the consultation, to produce the intended effect.

The plaintiff, in taking the conveyance from Winch, was as much the client of Mr. Ames, as Winch himself. The parties who meet, the one to give, and the other to accept a conveyance, have an equal, though it may be a different interest, in the transaction. The attorney who advises, does so, not less for the one than for the other.

Newton, *Lincoln* and *Child* for the defendant. The true rule seems to be, that whatever is disclosed to the attorney for the purpose of obtaining his advice, with reference to a cause of action, either in contemplation of its being enforced, or where legal proceedings are actually instituted, is privileged; because without this privilege, the administration of justice must be impeded. But this reason is not applicable to instruments of conveyance. Public policy requires, that the facts attending the execution of such instruments should be publicly known, for the prevention of frauds. 1 Stark. on Evid. 104; *Wadsworth* v. *Hamshaw*, 2 Brod. & Bingh. 5, note; *Williams* v. *Mundie*, Ryan & Moody, 34; *S. C.* 1 Carr. & Payne, 158; *Broad* v. *Pitt*, 3 Carr. & Payne, 518; *Cobden* v. *Kendrick*, 4 T. R. 431; *Duffin* v. *Smith*, Peake's R. 108.

Digitized by Google

Hatton v. Robinson.

South Sea Co. v. *Dolliffe*, cited in 2 Atk. 525: *Brandt* v *Klein*, 17 Johns. R. 335; *Bramwell* v. *Lucas*, 2 Barn. & Cressw. 745.

It is a forced construction of this deposition to infer from it, that any application was made by Winch for legal advice in the defence of any suit. None was then pending, and it was only among the events which were possible, that any suits would be instituted. Winch certainly could not have asked legal advice, whether his creditors could commence suits. It was not his purpose to defend, if they were commenced. The conveyance of property would not affect, in any manner, the right of any creditor to recover judgment for his debt, although it might defeat the collection of it. It does not appear, that Winch asked legal advice of Mr. Ames, on any subject, or that the latter gave any legal advice; and the burden of proof is on the plaintiff, to show that Mr. Ames acted in a professional capacity. The business could have been done as well by any other person as by an attorney at law.

But whatever objections may exist as to the disclosure of Winch's communications, the same principles will not apply to those of the plaintiff. Mr. Ames was not his attorney, if he acted in that capacity at all. The plaintiff had no suits to be defended, no attachments to be defeated; he asked no legal advice, and paid no compensation. Nor was Mr. Ames the attorney of both parties; for there was in reality but one party to the transaction; and it was not intended that the plaintiff should have the slightest beneficial interest in it.

The objection of the plaintiff went to the whole deposition. If some parts are admissible, the exception should have been taken to those portions which are inadmissible, in order that they might be struck out.

April term 1834.

Shaw C. J. delivered the opinion of the Court. The only question for the Court in the present case, is, whether the deposition of Mr. Ames was properly admitted in evidence; and this depends upon the further question, whether the matters testified to by him, were to be considered as within the rule of privileged communications. Another question was indeed made, namely, whether the deposition should have been wholly rejected; or if a part were objectionable, as being

Digitized by Google

privileged, the objection should not have been confined to such part. But as by far the greatest part of the deposition, both in bulk and importance, was alike open to the objection, and the part that would remain, would be almost, if not wholly immaterial, the objection at the trial seems to have been made to the deposition, without exception to that course, when it should in strictness have been made to the disclosure of the supposed privileged communication. But the cause has been argued upon the same grounds as if the objection had been thus taken, and we shall so consider it.

The rule, upon which the plaintiff's counsel in the present case relied, to exclude all that part of the testimony of Mr. Ames, which consisted of statements made to him by Winch, as to his views and motives in making the sale, upon which the plaintiff founds his title, is that well known rule of evidence, founded on the confidence which a client reposes in his counsel, attorney or solicitor. By this rule, it is well established, that all confidential communications between attorney and client, are not to be revealed at any period of time, nor in any action or proceeding between other persons; nor after the relation of attorney and client has ceased. This privilege is that of the client and not of the attorney, and never ceases, unless voluntarily waived by the client.

We had occasion lately to consider this subject in the case of *Foster* v. *Hall*, 12 Pick. 89, which was not published at the time this cause came before the Court, in which it was decided, that the privilege was not confined to the case of communications made to an attorney, with a view to the prosecution or defence of a suit or legal process, pending or immediately contemplated, at the time of the communication; but that it extends to all communications made to an attorney or counsellor, duly qualified and authorized as such, and applied to by the party in that capacity, with a view to obtain his advice and opinion in matters of law, in relation to his legal rights, duties and obligations, whether with a view to the prosecution or defence of a suit, or other lawful object.* This extent and modification of the rule, we thought, was well sup-

* In reference to this subject see *Greenough* v. *Gaskell*, 1 Mylne & Keene, 98

Digitized by Google

Hatton v. Robinson.

ported by the weight of authority, and consistent with the principle upon which the rule is founded. This principle we take to be this; that so numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it that they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, both in ascertaining their rights in the country, and maintaining them most safely in courts, without publishing those facts, which they have a right to keep secret, but which must be disclosed to a legal adviser and advocate, to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that on such facts the mouth of the attorney shall be for ever sealed. To the rule as thus stated we are still inclined to adhere.

But the privilege of exemption from testifying to facts actually known to the witness, is in contravention to the general rules of law; it is therefore to be watched with some strictness, and is not to be extended beyond the limits of that principle of policy, upon which it is allowed. It is extended to no other person than an advocate or legal adviser, and those persons whose intervention is strictly necessary to enable the client and attorney to communicate with each other, as an interpreter, agent or attorney's clerk. And this privilege is confined to counsel, solicitors and attorneys, when applied to as such, and when acting in that capacity. *Wilson* v. *Rastall*, 4 T. R. 753.

But there are many cases, in which an attorney is employed in transacting business, not properly professional, and where the same might have been transacted by another agent. In such case the fact that the agent sustains the character of an attorney, does not render the communications attending it, privileged; and they may be testified to by him, as by any other agent. In *Wilson* v. *Rastall* already cited, *Buller* J. says, that the privilege is confined to the case of counsel, solicitor and attorney, and it must be proved, that the information was communicated to the witness, in one of those characters; for if he be employed merely as steward, he may be examined

Digitized by Google

So where the matter is communicated by the client to his attorney for purposes in no way connected with the object of the retainer and employment of the attorney as such. *Cobden* v *Kendrick*, 4 T. R. 432. The Court say, the difference is, whether the communications were made by the client to the attorney in confidence, as instructions for conducting his cause, or a mere *gratis dictum*.

And so strictly is the rule held, that the privilege extends only to communications made by the client to his attorney for the purpose of obtaining legal advice, that in a late case it was held, that a communication made by a client to his attorney, not for the purpose of asking his legal advice, but to obtain information as to a matter of fact, is not privileged, and may be disclosed by the attorney, if called as a witness in a cause. *Bramwell* v. *Lucas*, 2 Barn. & Cressw. 745.

Looking at the deposition of Mr. Ames, with these views in respect to the legal privilege of communications between attorney and client, it appears quite manifest, that the rule of exemption does not apply to any communication made by Hatton the plaintiff, inasmuch as it does not appear that the witness was applied to by him, or that the relation of attorney and client, in any respect, subsisted between them. In regard to those communications, therefore, it appears to the Court, that the witness cannot be exempted from testifying.

But upon examining the other part of Mr. Ames's deposition, we cannot perceive that the communications were made to him by Winch with the purpose of instructing him in any cause, or engaging him in the conduct of any professional business, or of obtaining any legal advice or opinion. If the disclosure of his views and purposes, in the conveyance of property proposed to be drawn, was not, as stated in some of the books, a mere *gratis dictum*, the only purpose seems to have been to satisfy Mr. Ames's mind, and remove any scruple that he might entertain, as to the character of the transaction, and to convince him, that whatever might be the legal character of the act, it was not attended with moral turpitude. It did satisfy him, that he was not to be engaged in a conspiracy to cheat, and induced him to consent to draw the deed. Here was no legal advice asked, no opinion requested as to the effe-

Digitized by Google

Hatton v. Robinson.

and operation of such a conveyance in point of law, and none given. We are therefore necessarily brought to the conclusion, that either these disclosures were made without any particular motive, or if there was a purpose, connected with the proposed draft, it was to satisfy Mr. Ames's mind, upon a point of fact, not for the information of his own in point of law, and in either event they are not to be deemed privileged communications, which the witness was prohibited from disclosing. The whole deposition therefore was rightly admitted, and conformably to the case agreed, the nonsuit must stand.

HORATIO CARTER *versus* JAMES G. CARTER.

H. C. and G. C. signed a subscription paper, by the terms of which they each agreed to pay the defendant the sums written against their names, provided he would cause an institution for the education of teachers for schools, to be established in the town where the subscribers lived. A few days afterwards the whole amount of their subscriptions was paid to the defendant, he giving a receipt therefor, which set forth, that the money was "received of H. and G. C. in payment of a subscription by them made to encourage the establishment of a seminary" &c. It was *held*, that as no time was fixed by the subscription paper within which the institution was to be established, it should have been established within a reasonable time; and that, as it was not so established, assumpsit for money had and received might be maintained against the defendant to recover back the amount paid to him.

It was *held* also, that the subscriptions of H. C. and G. C. were several, and consequently that they should bring several actions to recover back the money paid by them.

THIS was assumpsit to recover the sum of $200 with interest.

The declaration contained, 1. a count for money had and received; 2. a count for money paid, laid out and expended, and lent and advanced; and 3. a special count, founded on a subscription paper hereafter set forth.

The defendant pleaded the general issue.

At the trial, before *Morton* J., the plaintiff, to maintain the issue on his part, produced a subscription paper of the following tenor:

"An institution for the preparation of teachers for our common schools, seems loudly called for by the intelligent part

Digitized by Google

of the community. The subject is now before the legislature, and probably in the course of this week a grant of fifteen thousand dollars will be made to carry the plan into effect. Connected with this institution is to be a school for children of both sexes, and the various branches to be taught in the different departments of the institution, will require a number of instructors. Public opinion is settled most decidedly in favor of the scheme, and no argument is necessary to show the vast general benefit of the proposed institution, the character and importance it will give to the town where it may be situated, and the increase of population, business and wealth it will necessarily occasion. Taking these things into view, and understanding that Mr. James G. Carter is about establishing an institution of the kind we have mentioned, to be under the patronage of the State, we, the subscribers, fully impressed with the vast consequence of the measure, as regards the town of Lancaster, do most cheerfully agree to pay to him the sums written against our names, provided he will cause the institution to be established in this town. Lancaster, March 5, 1827."

This paper was subscribed by a number of persons, among whom were the plaintiff and George Carter, who, each, subscribed the sum of $ 200.

The plaintiff also produced two receipts, dated March 28, 1827, and signed by the defendant. The first was of the following tenor: "Received of H. and G. Carter three hundred and six dollars, in part payment of a subscription by them made to encourage the establishment of a seminary for the education of the young in Lancaster." By the second, the defendant acknowledged that he had "received of H. & G. Carter a note payable on demand with interest, for the sum of ninety-four dollars, being the balance due on account of a subscription by them made to encourage" &c., as in the preceding receipt.

It was admitted by the defendant, that he had not established in Lancaster any such institution as is described in the subscription paper.

The defendant objected that, upon this evidence the plaintiff could not recover; but the objection was overruled; and it

Digitized by Google

Carter v. Carter.

was thereupon ordered, that the defendant should be defaulted. If the Court should be of opinion, that the plaintiff was entitled to recover, the default was to stand.

The case was argued in writing.

Merrick and *Smith* for the defendant. If the action is maintainable on any ground, it must be on the first count. But we contend, that it cannot be maintained even on that count.

1. Because it should have been brought by the plaintiff and George Carter jointly. The payment of the money is the gist of the action. 2 Saunders's Pl. & Ev. 672. The evidence of payment is the receipts, which were made to the plaintiff and G. Carter jointly; and these prove that the $300 was paid, but do not show how much was paid by the plaintiff and how much by G. Carter. Nor does it appear by whom the note was paid. The note and the receipts show that the payment was joint; and where a joint payment is made by two or more, they must join in an action to recover back the money paid. *May* v. *May*, 1 Carr. & Payne, 44. The circumstance that the subscription was several is immaterial. 1 Saunders's Pl. & Ev. 143; *Eccleston* v. *Clipsham*, 1 Wms's Saund. 153, and note; *Withers* v. *Bircham*, 3 Barn. & Cressw. 254; *S. C.* 5 Dowl. & Ryl. 106; *Anderson* v. *Martindale*, 1 East, 497.

2. The action cannot be sustained on the first count, even if the action were in its nature several. The payment was a voluntary payment of money, and was made with a full knowledge of all the facts and circumstances, or with the means of knowledge. By such payment, the plaintiff waived all the conditions in his favor. *Hill* v. *Green*, 4 Pick. 114; *Marriott* v. *Hampton*, 2 Esp. R. (Day's ed.) 546, and notes; *Cartwright* v. *Rowley*, 2 Esp. R. 723; *Bulkley* v. *Stewart*, 1 Day's R. 130; *Morris* v. *Tarin*, 1 Dallas, 147; *Clarke* v. *Dutcher*, 9 Cowen, 674; *Lothian* v. *Henderson*, 3 Bos. & Pul. 520; *Brisbane* v. *Dacres*, 5 Taunt. 143; *Graham* v. *Tate*, 1 Maule & Selw. 609; *Skyring* v. *Greenwood*, 6 Dowl. & Ryl. 401; Chitty on Contr. 190; *Elting* v. *Scott*, 2 Johns. R. 157; *Hall* v. *Shultz*, 4 Johns. R. 240.

Neither can this action be sustained on the ground of a

Digitized by Google

failure of the consideration for which the money was paid. The defendant made no stipulation which he has failed to perform. When the plaintiff paid the money, if he did not intend to part with it at all events, he should have exacted of the defendant a promise to repay it, in case the defendant should not establish an institution in Lancaster for the education of school-teachers, &c.

Hoar and *Washburn* for the plaintiff. If the view which we take of the case is correct, the defendant holds money, which in equity and good conscience belongs to the plaintiff, and that is sufficient to sustain an action for money had and received. *Mason* v. *Waite*, 17 Mass. R. 560; *Towers* v. *Barrett*, 1 T. R. 133.

The action is rightly brought in the name of the plaintiff alone. 2 Saund. Pl. and Ev. 718; *Eccleston* v. *Clipsham*, 1 Saund. 153; *Anderson* v. *Martindale*, 1 East, 497; *Withers* v. *Bircham*, 3 Barn. & Cressw. 254; *Nelson* v. *Milford*, 7 Pick. 18.

The money paid may be recovered back, on several grounds.

1. It was paid upon a condition. It is true, that no time was fixed by the agreement, for the performance of the condition; but in such case the law requires, that it shall be performed in a reasonable time. *Hayden* v. *Stoughton*, 5 Pick. 534; Com. Dig. *Condition*, *G* 5. This condition has never been performed, and the money paid may therefore be recovered back. *Griggs* v. *Austin*, 3 Pick. 22. The defendant contends that he has made no stipulation, and consequently that there has been no failure of performance on his part. But by the very acceptance of the agreement, he became a party to it. *Goodwin* v. *Gilbert*, 8 Mass. R. 510; *Phelps* v. *Townsend*, 8 Pick. 392; *Bret* v. *Cumberland*, Cro. Jac. 399.

2. The *only* consideration for the subscription was the benefits which would result from such an institution as was proposed. This consideration has failed, and the plaintiff may recover on this ground. *Spring* v. *Coffin*, 10 Mass. R. 31; *Woodward* v. *Cowing*, 13 Mass. R. 216.

3. If, as we contend, this money was paid upon a contract, by which the defendant was bound to establish the institution, he, having neglected to do this, has rescinded the contract,

Digitized by Google

Carter v. Carter.

and has therefore no right to retain this money. *Nockells* v *Crosby*, 3 Barn. & Cressw. 814.

4. This money was paid to the defendant, to be applied to the purposes of establishing an institution for the education of school-teachers. The defendant has never applied it to such purpose, and for this reason, also, he is bound to refund it. *Fisher* v. *Ellis*, 3 Pick. 326.

April term 1834.

SHAW C. J. delivered the opinion of the Court. It may simplify the case, to consider it merely as a demand for money had and received on the first count; without reference to any express promise, as contained in another count.

The Court, upon the facts as they appear in the report, are of opinion, that the plaintiff is entitled to recover as for money had and received to the plaintiff's use.

Nothing is better settled than the general principle, that whenever one receives money or other property upon certain terms and conditions, such an acceptance is an act by which the party receiving is as effectually bound as he would be by an express promise. *Goodwin* v. *Gilbert*, 10 Mass. R. 510. It is equally well settled, that where one receives money of another to hold upon a condition, and the condition does not happen, whether through his own default or otherwise, or for a special purpose and that purpose is not accomplished, the party receiving cannot conscientiously retain the money, and thenceforth he holds it in trust for the party who paid it, and is bound *ex æquo et bono*, to repay it on demand. It is money had to the use of the party who paid it. And when no time is fixed for the happening of such condition or the accomplishment of such purpose, it is held by law to be a reasonable time, of which, when the facts are found, the law takes cognizance, and decides according to the subject matter, and the circumstances of the case. We consider the case of the plaintiff to be clearly within this principle. It is not contended that a reasonable time has not long since elapsed, and that if the plaintiff could ever recover back his money, he may do it now. Taking the subscription paper and the receipt together, it appears that the plaintiff undertook to pay $200, and without waiting the actual accomplishment of the purpose, did pay it to the defendant, provided he would cause the institution to be

Digitized by Google

established in Lancaster. When the plaintiff signed this subscription, he agreed to pay &c., provided &c. This, as it stood, was an executory contract, and had an action been brought on it, there might have been a question of some difficulty, whether the condition was precedent or subsequent. But when the contract was executed, the condition was of course subsequent. To test this, suppose the promise was to pay the money within some short limited time, say ten days or thirty days, and it should appear manifest from the whole paper taken together, that the contemplated institution was not expected to be established till the lapse of a longer period, say six months, the contract would still have been conditional as before, but clearly upon a condition subsequent. The effect would be, that the money should be paid absolutely in the first instance, to the defendant, on condition that it be repaid, if the institution should not be established in Lancaster within a reasonable time. The effect of the payment in the present case was the same in legal effect. If the condition was originally a condition precedent, so that the subscribers could not have been compelled to pay, till the performance of the condition by the establishment of the institution in Lancaster, this condition was waived, and the condition in effect became a condition subsequent. Supposing, instead of the executory contract, the subscription paper had imported, that the several subscribers, with the same views and purposes as are expressed, had actually paid into the hands of the defendant, the several sums &c., on condition that he cause &c. In such case, there would be no need of any express promise on the part of the defendant to refund the money, if the condition were not complied with; because from that time the defendant would cease to have any legal or equitable right to hold and retain the money; it would be money held to the use of the subscriber, and the law would raise a promise to pay it, and afford a remedy to recover it. We consider that the subscription paper and the receipts together, constitute a transaction of the same character. The receipts prove the acceptance of the money by the defendant, and the subscription referred to, expresses the motives and purposes, the terms and conditions, upon which it was paid by the one, and received by the other

Digitized by Google

Carter v. Carter.

It was strenuously contended on the part of one of the defendant's counsel, that these receipts did not refer to this subscription paper; that two distinct institutions were contemplated; that the defendant did in fact establish such an institution as that contemplated by the receipts, namely, a seminary for the education of the young; and that he had not admitted that he had not established such an institution. This argument was pressed with so much earnestness, that before entering the judgment, we thought it necessary to inquire whether there was any mistake of the facts, and whether the defendant meant to contend that there was more than one subscription paper, or whether the receipts referred to any other subscription, or any other institution. On such inquiry it is conceded that there never was but one subscription paper, signed by the plaintiff and George Carter, promising to pay money for the encouragement of any seminary. The argument was this; the subscription paper contemplated an institution for the preparation of teachers for common schools, connected with a school for children of both sexes; the receipts referred to a subscription to encourage the establishment of a seminary for the education of the young. If these were distinct institutions and purposes, and the defendant had established the latter, and relied upon that as a performance of the condition, he should have shown it, and not been defaulted. But upon the question being put, he does not suggest that there was any other subscription. What then is the consequence? The receipts refer to a subscription, to encourage a seminary for the education of the young. These latter words are merely descriptive of the subscription, intended to identify it, and the receipts purport to be payments due on account of that subscription. Does not the subscription, produced substantially conform to that description? Probably the education of persons to be school-teachers, like the education of persons for any other professional life, would naturally be the education of young persons. Besides, a school for children of both sexes was to be connected with it. Might not this be well described, in short terms, as a seminary for the education of the young? When therefore such a subscription was entered into, a few days before, when it is admitted that no other subscription of like

Digitized by Google

character was ever entered into by the plaintiff, is not the conclusion irresistible, that this receipt referred to that subscription, as much so as if endorsed upon it? If so, then the admission of the defendant, that he had never established such an institution as is described in the subscription paper, is an admission that he had never established the seminary, on account of a subscription for the encouragement of which, the money was paid.

Another ground of defence relied on was, that upon the facts shown, the payment being made by Horatio and George Carter jointly, an action cannot be maintained by the plaintiff alone. Had this payment been made on account of a joint debt, this would have been a good ground of defence. But the nature and effect of this payment must be ascertained, by those of the debt. The payment is on account of their subscriptions, which were several. Suppose their several subscriptions had been made upon different conditions, as they well might be, having a right to prescribe their own terms; the condition might fail as to one, and not as to the other; one might recover back and not the other. Had the promise been joint, no such case could happen, because all the terms and conditions must have affected them jointly. We are therefore of opinion, that the payment must be taken to have been made for account of each separately, and therefore that the plaintiff may maintain his action severally, to recover the amount paid for his account.

I intended to have added, in connexion with the principal question, that this does not go at all upon the ground that the defendant was chargeable with any negligence, default or breach of his own contract or engagement. He did not, by accepting these subscriptions or donations, bind himself or undertake to establish a seminary, or render himself liable to the donors in damages for a failure. If he exerted himself ever so honorably and ably, and failed, it was the failure of a condition, upon which he could no longer claim to hold the money, though without any fault of his own.

Judgment on the default

Digitized by Google

JESSE PARKS *et al. versus* SETH KNOWLTON *et al.*

Devise: "I give to my wife the improvement of one half of my real estate, while she remains my widow, and all my household furniture to be at her disposal. I give to my four sons all the remainder of my estate, both real and personal, to be equally divided between them, share and share alike. My will is, that my executors have one year to pay one half of the legacies, and the other half in two years after my decease and the decease of my wife." The testator sold his real estate and died leaving a widow. It was *held*, that one half of the legacies was payable in one year from the probate of the will, and the other half in two years after the death of the widow.

Where a legatee, being the son of the testator, died in the testator's lifetime, leaving children, it was *held*, that all the children must join in an action for the recovery of the legacy.

THE parties stated the following facts.

This is an action brought against the executors of a will, to recover a legacy.

The will contains this clause: — "I give to my wife the improvement of one half of my real estate while she remains my widow, and all my household furniture to be at her disposal." And after some pecuniary legacies, the testator proceeds as follows: — "I give to my four sons, Artemas, William, Seth and Joseph H. Knowlton, all the remainder of my estate, both real and personal, to be equally divided between them, share and share alike. My will is, that my sons have one year to pay one half of the legacies, and the other half in two years after my decease and the decease of my wife." — "I constitute my two sons, Seth Knowlton and Joseph H. Knowlton, executors of this my last will."

Julia Parks, the wife of Jesse Parks, is a daughter of William Knowlton, who died in the lifetime of his father, the testator, leaving Julia and other children.

At the time of making the will the testator was seised and possessed of valuable real estate, which he sold before his death, taking promissory notes in payment. He held these notes at his decease, and they were inventoried by the executors. The executors settled an account in the probate court, by which it appears that there remained in their hands a sum of money for the residuary legatees, no part of which has been paid to Julia Parks as residuary legatee. After the settlement

Digitized by Google

Parks v. Knowlton.

of this account and after the lapse of one year from the probate of the will, a demand was made on the executors by the plaintiffs, for the payment of their proportion of the residuary bequest; which being refused, they brought this action to recover the same. The testator's widow is still living.

The parties submit to the determination of the Court, the questions whether the plaintiffs' action can be maintained; and if so, what amount they are entitled to recover.

Oct. 4th, 1832

J. Davis and *Washburn*, for the defendants, contended that it was the intention of the testator, that his widow should be supported by half of the income of the notes instead of half of the income of the real estate, for otherwise no adequate provision was made for her in the will; that this was a trust which the Court might carry into effect; Jeremy on Eq. Jurisd. 530, 531; and that the legacies were not payable until one and two years after the death of the widow.

Merrick, for the plaintiffs, cited to the point, that the sale of the real estate was a revocation of the devise, *Ballard* v. *Carter*, 5 Pick. 112; Toller, 3; *All Souls College* v. *Cod drington*, 1 P. Wms. 598; *Goodtitle* v. *Otway*, 7 T. R. 399; *Sparrow* v. *Hardcastle*, 7 T. R. 416, note.

Oct. 6th, 1832.

Per Curiam. It is very clear that as to the real estate of the testator, alienated after the date of the will, by the testator, the will could have no operation. As to the personal estate, the residuary clause gives the whole to the four sons, and this operates to pass the whole of the personal property, which the testator had at his decease, as well that acquired after the making of the will, by sale of real estate, as the rest. Then the only question is, as to the time at which the legacies were payable. The will in this respect is very obscure, and it is not easy to ascertain the intent of the testator. The testator appointed two of his sons executors, there being four. The clause in question is this: "My will is, that my sons have one year to pay one half of the legacies, and the other half in two years after my decease and the decease of my wife." By the term "sons" here must be intended those sons who were appointed executors, because legacies are to be paid by them. The language is extremely ambiguous. The provision being for children and grandchildren, is to be construed most

Digitized by Google

Parks v. Knowlton.

beneficially for them. Postponing payment is a restriction on the bounty intended. Taking it as it has been considered in the argument, that the term "legacies" extends to the whole of the personal property, then, according to the argument of the defendants, all provision in the personal property for the children and grandchildren, would be postponed to one and two years after the death of the widow; which might be a remote period. On the whole, the Court are of opinion, that by the natural and legal construction of the terms of the will, the one half of these legacies was payable in one year from the probate, when the executors became possessed of the assets, and that this construction is most consistent with the general intent of the will. We are therefore of opinion, that one half of the legacy to the plaintiff's wife was due when the demand was made, and to that part the plaintiffs are entitled.

Another question has occurred, whether this action was rightly brought, which we have not considered.

Oct. 4th, 1833.

Washburn now contended, that the children of William Knowlton took the legacy jointly, and that a several action by one of them for her share, could not be sustained. 1 Chit. Pl. (1st edit.) 5, 10; *Daniels* v. *Daniels*, 7 Mass. R. 136; Stearns on Real Actions, 197; Co. Lit. 169 *b*; *Ward* v. *Everard*, 1 Salk. 390; 2 Dane's Abr. 225; *St.* 1783, *c.* 52, § 3.

Merrick, *contrà*, relied on *St.* 1783, *c.* 24, § 17.

Oct. 7th, 1833.

Per Curiam. The 8th section of *St.* 1783, *c.* 24, provides, that when any child, grandchild or other relation having a devise of personal or real estate, shall die before the testator, leaving lineal descendants, such descendants shall take the estate, real or personal, in the same way and manner such devisee would have done in case he had survived the testator. By this it seems clear, that the lineal descendants take a joint interest in the legacy; and in such case they must all join in an action for the recovery of it. But the plaintiffs rely on the 17th section, in which are the following provisions. "And any executor, being a residuary legatee, may bring an action of account against his co-executor or executors of the estate of the testator in his or their hands, and may also sue for and recover his equal and proportionable part thereof; and any

Digitized by Google

other residuary legatee shall have like remedy against the executors. And any person having a legacy given in any last will, may sue for and recover the same at the common law." If the legacy in question had been given to Julia Parks, the case would have come within this clause; but she is not a legatee; and the 17th section does not, like the 8th, embrace lineal descendants of a legatee. Nor do the plaintiffs come within the rule by which a statute provision is extended, by construction, to a case coming completely within the spirit but not within the letter of the statute. A legatee may die leaving numerous lineal descendants, and this would cause inconvenience, by requiring a multiplicity of suits; it cannot, therefore, be considered as clearly within the intention of the legislature, to give to each descendant a several right of action.

Plaintiffs nonsuit.

Digitized by Google

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF MIDDLESEX, OCTOBER TERM 1833, AT CAMBRIDGE.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE,
HON. SAMUEL PUTNAM, }
HON. SAMUEL S. WILDE, } JUSTICES
HON. MARCUS MORTON, }

CHARLES PARKER *versus* ABRAHAM BIGLOW.

In an action upon a promissory note, on which usurious interest had been taken and reserved, it was *held*, that, under *St.* 1826, *c.* 27, the interest reserved was to be computed to the time of the verdict and to be added to the principal; that from this amount was to be deducted threefold the whole interest taken and reserved, computed as above; and that the plaintiff was entitled to judgment for the balance, with interest thereon from the time of finding the verdict to the time of rendering the judgment.

What would have been the effect of fraudulent conduct on the part of the defendant, or of unnecessary delay caused by him, for the purpose of increasing the forfeiture, *quære.*

UPON a case stated it appeared, that on October 28, 1828, the plaintiff lent to the defendant the sum of $ 295, and took his promissory note for the sum of $ 300, payable on demand with interest; that on December 25, 1828, the plaintiff agreed to lend the defendant the sum of $ 500 for one year, and thereupon delivered to him $ 170 in cash and the note for $ 300

Digitized by Google

and took the defendant's note for $500 payable on demand with interest, together with the defendant's receipt in full of an account, amounting to the sum of $2, which was due from the plaintiff to the defendant, for wool. The last mentioned note was the cause of the present action.

The writ was served in July 1829.

The Court were to render the same judgment, as if these facts had been found by the jury on December 22, 1830.

The case was argued in writing.

H. Mann for the plaintiff. We claim the principal sum lent on December 25, 1828, with lawful interest thereon to the time of the rendition of the judgment, deducting threefold the interest reserved and accruing upon the note to the time of the service of the writ only. The words "forbearing or giving day of payment," used in the *St.* 1825, *c.* 143, restraining the taking of usury, can mean nothing but a forbearing or giving day of payment, which is voluntary, and in pursuance of a *contract*; for an *involuntary* or *compulsory* forbearance (if that be not a solecism in terms) can be no offence. How long then did the plaintiff transgress the law? We say, from the date of the note till the time of service of the writ. The accumulating forfeiture terminated therefore upon the service of the writ. This construction of *St.* 1826, *c.* 27, graduates the penalty according to the aggravation of the offence, with precision. If the defendant had fulfilled his promise and held the plaintiff to all the rigors of the statute, when the demand of payment was made by the service of the writ, he would have paid him a sum equal to the principal lent, with lawful interest thereon, deducting threefold the usury which had then accrued or been reserved; if the plaintiff forfeits also threefold the interest accruing between the service of the writ, and the rendering of the verdict or the rendition of judgment, the defendant will gain by the violation of his own contract; and a most impolitic temptation will be held out to him to postpone the decision by improper means. *Robinson* v. *Bland*, 2 Burr. 1088.

The principles adopted in the following cases are applicable to this action. *Powell* v. *Farmer*, Peake's Cas. 57; *Holland* v. *Duffin*, Peake's Cas. 58; *Crepps* v. *Durden*, Cowper, 640; *Brooke* v. *Milliken*, 3 T. R. 509.

Digitized by Google

Parker v. Biglow.

In making a usurious contract, the lender demands not on. what he considers an equivalent for the use of the money lent, but also what he considers to be a fair compensation for the risk of being subjected to the penalties of usury. When, therefore, the borrower violates his contract by refusing payment, and by setting up the defence of usury to an action instituted upon the contract, the lender has incurred the entire risk. That which was before a hazard, has now become a *certain* loss, and the very elements of a usurious contract, *as to the future*, are no longer in existence.

Unless interest is allowed to the plaintiff on this note, he will lose fourfold the interest, instead of threefold.

T. Bigelow, for the defendant, cited as to the amount of the forfeiture, *Brigham* v. *Marean*, 7 Pick. 40.

Morton J. drew up the opinion of the Court. The facts in this case clearly show the note to be usurious. Indeed the usury is admitted, and the only question presented for our consideration is the amount for which the plaintiffs shall have judgment.

This must depend upon the proper construction of *St.* 1826, *c.* 27, under which this contract was made and by which it must be governed.

By the first section of that statute it is provided, "that whenever, in any action brought on any contract or assurance for the payment of money, it shall appear to the court, before which such action shall be tried, that a greater rate of interest shall have been directly or indirectly reserved or taken, than is allowed" by *St.* 1825, *c.* 143, "the defendant shall recover his full costs, and the plaintiff shall forfeit threefold the amount of the whole interest reserved or taken, and shall have judgment and execution for the balance only, which may remain due upon said contract or assurance, after deducting threefold the amount of said interest; and whenever a greater rate of interest shall have been *paid* than as aforesaid, a remedy shall accrue to recover back threefold the amount of the whole interest paid."

Under this provision it will be proper to inquire, what is the amount of the forfeiture incurred, and from what sum that forfeiture is to be deducted to ascertain the balance for which

Digitized by Google

the plaintiff is to have judgment. The plaintiff shall forfeit threefold the amount of the whole interest reserved or taken. How much interest did the plaintiff reserve or take? How much money did the plaintiff lend, for which he received a note for $500? The statement of facts shows that he advanced, on October 28, 1828, $295·00, and on December 25, 1828, $168·00 more, after deducting $2.00 for the account due from the plaintiff to the defendant, making the sum of $463·00 for which the note in suit was given, leaving a deficiency of $37·00, which was in effect received by the plaintiff as usury. To this sum must be added the interest on the note, and the amount trebled.

But up to what time shall this interest be computed? Shall it be for the year during which the plaintiff agreed to give a credit on the loan? Shall it be till the time when this suit was commenced? Shall it extend up to the time of trial? Or shall it be prolonged until the rendition of the judgment? It is very clear it cannot be the latter. It is agreed, that the statement of facts shall be treated as the verdict of a jury. And in no sense can interest on the verdict, which is allowed in the nature of damages for the detention, up to the rendition of final judgment, be considered as interest reserved or taken on the original contract. It is computed on a different sum and in some cases may be at a different rate. Besides, it would be unreasonable to subject the plaintiff to a penalty for the delay of the court in rendering judgment on the verdict.

It is also equally clear, that the time cannot be limited to one year, because, whatever might have been the conversation between the parties and their expectation as to the delay of payment, the note, which is the only legal evidence of the contract, is payable on demand.

Shall the interest be computed to the time of the verdict, or shall it stop at the time of the demand, which was the commencement of the action? It is contended by the plaintiff that it must be the latter, because the offence consists in the voluntary forbearance and giving day of payment; that after the plaintiff had commenced his action, the delay was occasioned by the misconduct of the defendant and without any default of the plaintiff; that to allow the defendant the benefit of the

Digitized by Google

Parker v. Biglow

treble interest during the pendency of the suit, would afford to him strong inducements to procrastinate the decision, and enable him to punish the plaintiff for his own misconduct. This objection appears to have some weight and is deserving of consideration.

It is to be remarked, in the first place, that in this case the defendant has not sought or obtained any unnecessary delay On the contrary, the plaintiff has brought the case to this Court by appeal. And the facts have been agreed at the first term and as soon as the cause could be reached for trial by the jury. What would be the effect of fraudulent conduct on the part of the defendant, or of delay procured by him for the purpose of increasing the forfeiture, we have no occasion now to determine, and the case is not embarrassed by any consideration of the kind. The parties proceeded to have their rights determined with reasonable expedition, and the defendant only exercised his legal rights in making this defence.

This question must turn upon the true construction of the statute. The plaintiff shall forfeit *threefold* the amount of the interest reserved by his contract or assurance. How much was reserved by the contract? We think it was the amount of interest calculated upon the note from its date up to the time when the amount due on the note was ascertained by the verdict of the jury. If the note had been paid by the defendant, the amount of interest reserved would be ascertained by computing the interest on the note from its date to the time of payment. In the case at bar a suit was instituted to compel payment; the defendant made a defence against the suit, which he lawfully might do, and which is fully sustained to the extent to which it is made. And the parties proceeded with reasonable diligence to determine their disputed rights. When they are determined, the balance which is legally due from the defendant to the plaintiff is ascertained. Up to this time the plaintiff, by virtue of his contract, recovers interest on the face of it. And we are of opinion, that the amount of the interest to be trebled is to be computed on the note from its date to the time of the verdict, or, in this case, to the finding of the facts which is a substitute for the verdict. And this construction is necessary to give effect to the statute. Did the in-

Digitized by Google

terest cease on the commencement of the action, or a demand of payment, the statute would be easily evaded, and, instead of preventing, it would be a great encouragement to usury. A usurious note is not void. If the usurer reserved twenty per cent. or any other high rate of interest on a note payable on demand, and the next day or week put it in suit or made a demand, all he would lose would be threefold the interest for a day or week; while he might recover on the contract the exorbitant interest reserved in it, for a length of time, which might depend on the ability of the borrower to meet the demand. Such a construction is unreasonable and subversive of the object of the statute.

By the above rule, to the sum first stated, of $37·00, must be added the interest on the note from December 25, 1828, to December 22, 1830, amounting to $59·75, making in the whole $96·75, which being trebled amounts to $290·25. This is the amount of the forfeiture. From what sum shall this be deducted? We think from the note and interest computed as before stated. The plaintiff shall have judgment for the balance which shall remain due on the contract after deducting threefold the interest. The contract is a valid one notwithstanding the usury, and the promise contained in it is to be fully enforced. This promise is to pay $500, with interest, which is $59·75 and makes the whole amount to $559·75. Deducting from this, $290·25 as before stated, leaves a balance of $269·50 due to the plaintiff This is the sum for which a verdict would have been rendered. But as judgment has been suspended, interest must be computed from the time when the verdict should have been rendered, up to the time of the rendition of judgment. That this is the true rule is made more manifest, by comparing this clause of the statute with the next subsequent one. Suppose the defendant had paid the note and interest and sued for the forfeiture; he would most clearly have recovered threefold the interest paid; which would produce the same result as is above stated. To deprive the plaintiff of the interest on his note before the forfeiture is deducted, would be to subject him to a penalty of *fourfold* the interest reserved, instead of *threefold*. And we can entertain no doubt, that it was the intention of the legislature that the

Digitized by Google

Parker v. Biglow.

usurer should be punished for his usury by a forfeiture of all the interest reserved, and of double the amount thereof in addition thereto.

These principles are sustained throughout by the case of *Brigham* v. *Marean*, 7 Pick. 40. By the statute the defendant is entitled to recover costs.

URIAH OAKES *versus* CHARLES HILL.

A number of persons met together and organized themselves as a voluntary religious society. No further meeting was held within six months, when the question was made, whether the society had not been dissolved. The records were afterwards burnt, but it did not appear that this was done by order of the society, nor had there been any corporate act evincing an intention to abandon their corporate powers. Many members filed with the clerk of the First Parish a certificate that they had withdrawn from the voluntary society, but it did not appear that there were no other members. It was *held*, that these facts did not prove that the voluntary society had been dissolved.

So, the omission for two years, to meet for parochial purposes and for the choice of officers, was *held* not to have operated as a dissolution of this society. *See note.*

The recording officer of religious and other corporations may make copies of his records, and his certificate will be evidence of the verity of the copy; but it is no part of his duty to certify facts: — wherefore, where the clerk of a religious society certified simply, "that the plaintiff, at his own request, had ceased to be a member of the society," it was *held* that the certificate was not legal evidence of that fact.

THIS was an action on the case against the defendant, for refusing the plaintiff permission to vote at a parish meeting in Malden.

On the trial it appeared, that formerly the town of Malden consisted of one parish, and transacted their parish business in town meeting, the town clerk and other town officers serving as parish officers.

By *St.* 1819, *c.* 128, a Baptist poll parish was created in Malden. Nearly at the same time a voluntary Methodist society was organized in the same town.

The remaining inhabitants in Malden constituted the First Parish, and they organized themselves as a parish, and chose parish officers, in 1824.

In April 1828, a voluntary religious society was duly organized in Malden, which was called "The Congregational

Digitized by Google

Religious Society for the Support of Orthodox Preaching in Malden."

It was testified by Ephraim Buck, a justice of the peace, that he issued the warrant on which this society was organized; that at the meeting for organizing it, Nathan Newhall was chosen clerk; that the society had no subsequent meeting for parochial purposes; that their records were returned to him, and that he burnt them, about the end of the year 1830; which was after the commencement of this action.

On October 20, 1828, a meeting of the First Parish was regularly held for parochial purposes. At that meeting the defendant, who had been legally chosen and qualified as the clerk of the parish, acted as clerk, and in that character presided at the meeting, in the choice of a moderator; and while he was so presiding, the plaintiff claimed a right, as a member of the First Parish, to vote, and offered his vote for a moderator. But the defendant refused to receive the vote, and for this refusal the present action was brought.

At the time when the plaintiff so offered to vote, he was more than twenty-one years of age, and had been an inhabitant of Malden, paying annual state, county and town taxes on his poll and estate for several years, and he was then in all respects a legal and qualified voter in town affairs in Malden; and for several years prior to 1828 he had been a regular member of the First Parish. He was the owner of two pews in the meetinghouse of the First Parish, but this is a territorial parish, and no tax has ever been assessed on the pews.

At the time of the organization of the abovementioned Congregational Religious Society, the plaintiff assisted in its organization and was chosen one of its assessors.

On June 23, 1828, the plaintiff obtained from the clerk of that society, and filed with the clerk of the First Parish, a certificate as follows: — "Malden, June 23, 1828. This certifies that Capt. Uriah Oakes is a member of the Congregational Religious Society for the Support of Orthodox Preaching in said town. Attest, Nathan Newhall, clerk of said society."

On July 29, 1828, the plaintiff obtained from the clerk of that society, and filed with the clerk of the First Parish, a

Digitized by Google

Oakes v. Hill.

certificate as follows: — "Malden, July 29, 1828. This certifies that Capt. Uriah Oakes, at his own request, has ceased to be a member of the Congregational Religious Society for the Support of Orthodox Preaching in said town. Attest, Nathan Newhall, clerk of said society." Newhall had no authority to give this certificate, unless such authority resulted from his office of clerk. On presenting this certificate, the plaintiff demanded of the defendant a certificate that the plaintiff had joined and become a member of the First Parish; which the defendant declined giving him.

On August 26, 1828, and before any parish tax had been assessed for that year, the plaintiff and sixty-eight other persons, inhabitants of Malden, (most of whom, at about the same time with Oakes, filed with the clerk of the First Parish similar certificates of Nathan Newhall, that they had joined and also had ceased to be members of the society for the support of orthodox preaching) filed with the assessors of the First Parish a certificate as follows: — "To Ebenezer Nichols, Edward Wade and Charles Hill, assessors of the First Parish in Malden. We the subscribers hereby certify and give information, that we have united with and become members of said First Parish and are liable to taxation in said parish. Malden, August 26, 1828."

With the consent of the parties the judge ordered the jury to return a verdict for the plaintiff, with liberty to the defendant to move to have it set aside.

The defendant accordingly moved that the verdict might be set aside and a judgment be entered in his favor or a new trial be granted, because the plaintiff having, on June 23, 1828, by his own voluntary proceedings, determined his connexion with the First Parish and legally joined another society, he could not again rejoin the First Parish, except by obtaining their consent and a legal dismission from the new society which he had joined, or by the legal dissolution of the new society, or by his removing into Malden from some other place; neither of which events had happened.

If in the opinion of the Court the plaintiff had not a right to maintain his action against the defendant, the verdict was to

Digitized by Google

Oakes v. Hill.

Oct. 20th, 1832.

be set aside, and a judgment entered for the defendant or a new trial granted.

Saltonstall and *Peabody* for the defendant.

Hoar and *C. Lewis* for the plaintiff.

April term 1823, at Concord.

MORTON J. drew up the opinion of the Court.* In the former trial of this case it was decided,† that a parish had no power to exclude any of the inhabitants of its territory from parochial rights and privileges; and that every inhabitant of a parish not procuring an exemption by becoming a member of some other religious society, was liable to all the burdens and entitled to all the rights of a member of the parish. Parishes were likened to towns in this respect, and it was holden that the former had no more power to exclude from parochial, than the latter had, from municipal rights.

In pursuance of these principles it was determined, that when the plaintiff dissolved his connexion with the voluntary society of which he had been a member, he *ipso facto* became a member of the parish. A certificate of such dissolution, from the clerk of the voluntary society, was produced at the former trial; no question was then started as to the effect of it; and the decision was made upon the assumption that the plaintiff had ceased to be a member of the voluntary association. As this point had not been investigated, it was intentionally left open, in order that if there was any doubt whether the plaintiff had in fact withdrawn from that society, it might be thoroughly examined.

This is the only remaining question in the case. Every other point was fully considered and decided in the former judgment. The action has been again tried; the facts are before us, and we are now to decide whether they show a dissolution of the plaintiff's connexion with the voluntary society. Having been a member, it is incumbent on him to show that he had ceased to be such before he claimed a right to vote in the old parish.

It was argued that the voluntary society had been dissolved, and so all its members divested of all the rights and immuni-

* *Shaw* C. J. did not sit in the cause. † See *Oakes* v. *Hill*, 10 Pick. 333.

Digitized by Google

Oakes v. Hill.

ties derived from their association. This is the first question to be determined.

It was holden in our former judgment, that religious societies formed under the statute of 1811, c. 6, possessed limited corporate powers and were to be treated as, and deemed to be, corporations for certain purposes.

It is said in books of high authority, that a private corporation may be dissolved by statute; by the death of all its members; by a surrender of its franchises; and by a forfeiture of its charter, through negligence or abuse of its franchises. 2 Kent's Comm. 245; 1 Bl. Comm. 485. It is very manifest that this society has not been dissolved in either of these methods.

These corporations are somewhat peculiar as to the mode of their creation and the nature and extent of their powers, duties and liabilities. And as by the provisions of our statutes, every member has the power of withdrawing at pleasure, it would seem that the society itself, having discharged all its liabilities, might by its own act cause its own dissolution. At least, this might be done by the unanimous act of the society, for every individual might withdraw and leave none to sustain the corporate powers.

But in the case at bar there was no vote to dissolve the society, nor any corporate act evincing an intention to surrender or abandon their corporate powers. If the *sixty-nine* who filed their certificate with the assessors, had actually withdrawn from the society, yet it does not appear, nor is it to be presumed, that there were no other members. The society might well continue after their secession.

The burning of the records of the society does not prove its dissolution. The existence of a corporation does not depend on the preservation of its records. The act of an individual member or an officer of a corporation, cannot destroy the corporation itself. Besides, the records were not destroyed till after the plaintiff had claimed the right to vote and commenced this action.

The omission of the members to hold meetings, had it been for a much longer time, would not have shown the extinction of the society. From the last meeting up to the time when it

Digitized by Google

is contended that it had ceased to exist, was a period of only six months.*

Upon the whole, we think it very clear that the report furnishes no evidence of the dissolution of the society.

Had the plaintiff then withdrawn from the society by his own act, or been dismissed from it in any legal manner?

A member of a parish or other religious society, may withdraw without the consent of the corporation of which he was a member. But this can only be done in the manner prescribed by our statutes upon the subject. The only method pointed out is by becoming a member of another religious society, and filing a certificate of the fact, either with the clerk of the town, by *St.* 1811, *c.* 6, § 2, or with the "clerk of the society left," by the *St.* 1823, *c.* 106, § 2. The plaintiff had not resorted to either of these modes to dissolve his connexion with the voluntary society.

Had he been dismissed from the society by any act of theirs?

Corporations of this kind have the power to regulate the admission, the expulsion and the dismission of members. When they are created by a direct act of the legislature, they sometimes have it by express grant. But if this be not the case, they have it as incidental to the corporate powers granted. This power may be exercised by the whole society, or by any of its officers to whom it may be delegated. It is a proper subject to be regulated by the by-laws of the society.

No officers of the society, by virtue of their offices, have this power. If they have it at all, it must be by the express delegation of the society itself. There is no evidence, nor

* In the case of *Lynde* v. *Hill*, argued and determined at October term 1833, the plaintiff claimed damages of the defendant for refusing him permission to vote for a moderator at the several meetings of the First Parish in Malden on October 20, 1828, March 23, 1829, and March 22, 1830. The facts generally were the same as in *Oakes* v. *Hill*. It appeared that the society for the support of orthodox preaching had never met for the transaction of parochial business, after the meeting on April 18, 1828, at which the society was organized; and the counsel for the plaintiff stated, that the society had had no minister and had held no meeting for public worship. The *Court* decided, that assuming this suggestion of the counsel to be true, the omission for two years, to hold a meeting for parochial purposes and to choose officers, did not operate as a dissolution of the society.

Digitized by Google

Oakes v. Hill.

have we any reason to believe, that it was ever granted, either by the by-laws, or by any other corporate act of this society. The clerk of the society clearly had no power of dismissing members. And there is no evidence that the society ever gave a dismission to the plaintiff. If they did it at all, it must have been by a vote. The proper evidence of such vote would be, a certified copy of the records. No such copy is produced. The paper attested by the clerk does not purport to be a copy of any record, but a certificate of a fact. Clerks of religious and other corporations, and other recording officers, may make and verify copies of their records, and in doing so, act under the obligation of their oath of office. Of the verity of such copies their certificates are evidence. But it is no part of their duty to certify facts, nor can their certificates be received as evidence of such facts.

If the clerk undertook to give the plaintiff a dismission, it was an unauthorized act on his part and can have no effect.

Upon a view of all the facts reported, we are very clearly of opinion, that the plaintiff had not ceased to be a member of the voluntary society at the time when he claimed a right to vote in the old parish; that the clerk of the parish did right, in refusing to give him a certificate that he had become a member of the parish, and also, when presiding in parish meeting, in rejecting his vote.

The verdict must be set aside and a new trial granted.

Digitized by Google

DEBORAH CARPENTER *versus* JOHN HEARD *et al.*

A testator bequeaths to his granddaughter J. C. L. a sum of money, to be paid to her when she arrives at twenty-one or is married; and directs that if she shall die under twenty-one *and* unmarried, the legacy shall be paid to his other granddaughters. J. C. L. died in the lifetime of the testator, unmarried, but *after* attaining twenty-one. It was *held* that the other granddaughters took nothing under the bequest.

In the case of a bequest to J. C. L. and the other granddaughters in like form, except that the conditional words were, "if J. C. L. shall die before she arrives at the age of twenty-one years *or* is married," it was *held* that the other granddaughters took nothing under the bequest.

THIS was an appeal from a decree of the probate court sanctioning a payment made by the appellees as executors of the will of Thomas Lee, to Mary Ann Lee, and the representatives of Louisa and Georgiana Lee.

The will was made on the 19th of August, 1825; and it contains, among others, the following bequests.

"I give and bequeath to my granddaughters Mary Ann Lee, Louisa Lee and Georgiana Lee, the children of my late son George G. Lee, deceased, the sum of 17,000 dollars, to be equally divided between them; and if either of them shall die before me without leaving a child or children, her share shall go and be paid to the survivors or survivor."

"I give and bequeath unto my granddaughter Judith Coleman Lee, daughter of my late son William Coleman Lee deceased, the sum of 17,000 dollars, to be paid to her when she arrives at the age of twenty-one years or is married, whichever shall first happen; and my will further is, and I do order and direct, that if my said granddaughter Judith Coleman Lee shall die under twenty-one years of age *and* unmarried, that the said legacy heretofore bequeathed to her, shall go and be paid to my said granddaughters the said Mary Ann Lee, Louisa Lee and Georgiana Lee; and if either of them be then dead, to the survivors or survivor of them, and to the child or children, if any, of such deceased granddaughter, the child or children of such deceased granddaughter to take his, her or their mother's share only. And I do hereby direct my executors hereinafter named, to retain in their hands so much of

Digitized by Google

Carpenter v. Heard.

my personal estate as shall be sufficient to pay the said sum of 17000 dollars when the same shall become due and payable as aforesaid."

"I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal and mixed, as follows, to wit: — One half part thereof to my granddaughters the said Mary Ann Lee, Louisa Lee and Georgiana Lee, their heirs and assigns for ever; and if the said Mary Ann, Louisa and Georgiana, or either of them, shall die before she or they arrive at twenty-one years of age, and unmarried, then my will is, that her or their share so dying shall go to the survivors or survivor, her or their heirs and assigns for ever; and the other half part thereof I give, bequeath and devise to my granddaughter Judith Coleman Lee, her heirs and assigns for ever; but if said Judith Coleman Lee shall die before she arrives at the age of twenty-one years *or* is married, then I give, bequeath and devise said other half part of said rest, residue and remainder of my estate as aforesaid, to my said granddaughters the said Mary Ann, Louisa and Georgiana, and to the survivors and survivor of them, their heirs and assigns for ever."

The testator died January 11, 1830, and his will was proved in March following.

Judith Coleman Lee, having attained the age of twenty-one years, died, unmarried, in the lifetime of the testator.

Besides the children of his son George G. Lee, the testator had two daughters who survived him, the appellant and Louisa Waterhouse, to both of whom he made large bequests. At the date of the will the daughters had no issue, nor was it probable that they ever would have any.

The question was, whether the appellant was entitled to a share of the legacies bequeathed to Judith Coleman Lee, or whether the whole amount of them was rightfully paid over by the executors to Mary Ann Lee and the representatives of Louisa Lee and Georgiana Lee.

Oct. 18*th*, 1832.

S. Hubbard and *Aylwin* for the appellant. Judith C. Lee having attained the age of twenty-one; the bequest over, of the 17,000 dollars, did not take effect. Her dying under age and unmarried was a condition precedent, and not a conditional limitation. *Doo* v. *Brabant*, 4 T. R. 706; *S. C.* 3 Bro.

Digitized by Google

C. C. 393; *Calthorpe* v. *Gough*, ibid. note, and 4 T. R. 707, note; *Holmes* v. *Cradock*, 3 Ves. 317; *Parsons* v. *Parsons*, 5 Ves. 578; *Humberstone* v. *Stanton*, 1 Ves. & Beame, 385; *Williams* v *Jones*, 1 Russell, 517.

The residuary clause must receive the same construction as the other, for in the conditional words, "if Judith C. Lee shall die before she arrives at the age of twenty-one years *or* is married," *or* means *and*. *Fairfield* v. *Morgan*, 5 Bos. & Pul. 38; *Denn* v. *Kemeys*, 9 East, 366; *Jackson* v. *Blanshan*, 6 Johns. R. 54; *Ray* v. *Enslin*, 2 Mass. R. 554; *Holmes* v. *Holmes*, 5 Binn. 252.

J. Pickering and *Ashmun* for the appellees. In Fearne, (7th edit.) 509, it is laid down, that "where a devise is made after a preceding executory or contingent limitation, or is limited to take effect on a condition annexed to any preceding estate, if that preceding limitation or contingent estate never should arise or take effect, the remainder over will nevertheless take place, the first estate being considered only as a preceding limitation, and not as a preceding condition to give effect to the subsequent limitation." This is supported by the cases of *Scatterwood* v. *Edge*, 1 Salk. 229; *Jones* v. *Westcomb*, 1 Eq. Cas. Abr. 245; *S. C.* Prec. in Ch. 316; *Gulliver* v. *Wickett*, 1 Wils. 105; *Frogmorton* v. *Holyday*, 3 Burr. 1624; *Avelyn* v. *Ward*, 1 Ves. sen. 420; *Statham* v. *Bell*, Cowp. 40; *Bradford* v. *Foley*, Doug. 63; *Meadows* v. *Parry*, 1 Ves. & Beame, 124; *Parry* v. *Boodle*, 1 Cox, 183; *Pearsal* v. *Simpson*, 15 Ves. 29. In the case at bar the legacy to Mary Ann &c. is to take effect upon a condition annexed to the preceding bequest to Judith C. Lee, and her bequest being defeated, the limitation over takes effect, within the principle above stated. See also *Jackson* v. *Durland*, 2 Johns. Cas. 314; *Miller* v. *Warren*, 2 Vern. 207; *Ledsome* v. *Hickman*, ibid. 611; *Willing* v. *Baine*, 3 P. Wms. 115; *Darrel* v. *Molesworth*, 2 Vern. 378. The words "but if" are ordinarily words of condition, but the cases cited show that they are not to be so construed in this bequest. The decisions in the cases of *Doo* v. *Brabant*, *Calthorpe* v. *Gough*, and *Williams* v. *Jones*, may perhaps be reconciled with former cases there being two remainders over, not in succession

Digitized by Google

Carpenter v. Heard.

but in the alternative; but otherwise they are inconsistent with the law as previously settled, and having taken place since the American revolution, they cannot be regarded as authority in this country. *Packard* v. *Richardson*, 17 Mass. R. 133; *Cathcart* v. *Robinson*, 5 Peters's Supr. C. R. 280; *Baring* v. *Reeder*, 1 Henn. & Munf. 158. The case of *Cumberstone* v. *Stanton*, 1 Ves. & Beame, 385, is adverse to the position we take, but it is in opposition to *Avelyn* v. *Ward* and other cases above cited, and is not law. Sir *William Grant* was not aware that he was contradicting former decisions. In *Murray* v. *Jones*, 2 Ves. & Beame, 313, he recognises the principle we lay down, and cites *Jones* v. *Westcomb*. In the case of a devise to an expected child, and if it die before attaining twenty-one years, then over, it is settled that the contingency is not a condition, but a conditional limitation to the estate to which it is annexed. But it can make no difference whether the child is expected to be born or is actually born. *Gulliver* v. *Wickett*, 1 Wils. 105; *Statham* v. *Bell*, Cowp. 40; *Meadows* v. *Parry*, 1 Ves. & Beame, 124; *Murray* v. *Jones*, 2 Ves. & Beame, 313. The real intention of the testator, which is the governing principle in the construction of wills, is manifest. He gives legacies to his two daughters, who had no issue and probably never would have, and to the two branches of his grandchildren. He evidently looks forward to the grandchildren as the only descendants to represent him, and he intends that if Judith C. Lee should not take and transmit her legacy, it should go to the other grandchildren. *Lowe* v. *Huntingtower*, 4 Russell, 532.

Oct. 17th, 1833.

PUTNAM J. delivered the opinion of the Court.* The question is, whether the appellant shall recover as an heir at law, or the surviving grandchildren shall take as legatees.

The right of the heir is clear, and not to be set aside, unless the testator has manifested a clear intent to take it from the heir and give it to a legatee. We are to ascertain whether there is such an intent manifested in the case at bar. It is perfectly clear, that if Judith C. Lee had lived until she became twenty-one years of age, or if she had been married be-

* *Shaw* C. J. did not sit in the case.

Digitized by Google

fore she became of that age, the testator intended she should have the money bequeathed to her. It was given expressly "to be paid to her when she arrives at twenty-one years of age or is married, whichever shall first happen." But she died after she became twenty-one years of age, and unmarried, in the lifetime of the testator. If there were nothing further said in the will, this would be a lapsed legacy, and should be distributed accordingly. But the testator proceeds to make the bequest upon which the appellees rely, in the words following; — "My will further is, that if my granddaughter Judith Coleman Lee shall die under twenty-one years of age, *and* unmarried, the said legacy heretofore bequeathed to her shall go and be paid to my granddaughters, the said Mary Ann" &c.

As has been said, Judith C. Lee did not die under, but over the age of twenty-one years; but she was unmarried. In the residuary clause he bequeathed one half of the rest, residue, &c., to the other grandchildren, with cross remainders between them, and the other half to Judith C. Lee for ever, and then says, "But if said Judith C. Lee shall die before she arrives at the age of twenty-one years *or* is married, then I give, bequeath and devise said other half part of said rest, residue and remainder, &c., to my said granddaughters Mary Ann," &c.

It is not contended but that the true intent and meaning of the condition or the conditional limitation, whichever it may be, is the same in both bequests, viz. in respect to the 17,000 dollars, and the one half of the residue of the estate, notwithstanding in the former he uses the copulative conjunction *and*, and in the latter, the disjunctive, *or*, in relation to the contingencies specified. If *and* should be read *or*, then, if there were nothing in the will to the contrary, the surviving grandchildren should take; for the bequest would come within one or other of the alternatives. They would have the money, if Judith C. Lee died either under twenty-one years of age, or if she were unmarried. And as she died unmarried, they would be entitled under the strict condition of the bequests, if it should be read disjunctively. There is no doubt, that *or* may be read *and*, to effectuate the intent of a testator. *Vid.* cases cited in *Roe dem. Fulham* v. *Wickett*, Willes, 311.

Digitized by Google

Carpenter v. Heard.

note. In the case before us we think it clear, that *or* in the residuary clause, should be read *and*, as is written in the previous bequest. For otherwise the legacy would be payable to Mary Ann, &c., notwithstanding Judith C. Lee should be married, and notwithstanding she should arrive at full age. Whereas, if she had married and died under twenty-one years of age, the legacy would have vested, or if she had arrived at the age of twenty-one years and had not been married, the legacy would have vested, according to the manifest intent of the testator. So that it is perfectly manifest, that Mary Ann, &c., can not maintain their right upon the ground that the contingencies contained in the bequests to them, have happened. *Jackson* v. *Blanshan*, 6 Johns. R. 54.

But the counsel for the appellees contend, that the bequests to Judith C. Lee were not strictly upon condition, but were conditional limitations; and that as the bequests to her have failed, she having died before the testator, the limitations over to Mary Ann, &c., took effect immediately; that the conditional limitations attached to the bequests to Judith, and that as they have failed by reason of her dying before the testator, they are and were avoided; so that as the bequests to Judith C. Lee are removed, Mary Ann, &c., are to take just as if the bequests had been made absolutely and originally to them.

And the appellees rely upon the case of *Jones* v. *Westcomb*, 1 Eq. Cas. Abr. 245, which arose under the will of Robert Waith, made in 1686, and upon other cases arising under the same will, which continued to be litigated for more than half a century from its date. Those cases are *Andrews ex dem. Jones* v. *Fulham*, 2 Eq. Cas. Abr. 294, (more fully reported in 8 Vin. 103, *Devise*, *L*, *pl.* 53, and better still in 2 Str. 1093,) and *Gulliver* v. *Wickett*, 1 Wils. 105.

Jones v. *Westcomb* was determined by Lord *Harcourt*. It is stated in 1 Eq. Cas. Abr. 245, very shortly thus;—"A, possessed of a long term for years, by will devised it to his wife for life, and after her death to the child she was then enceinte with, and if such child died before it came to twenty-one, then he devised one third part of the same term to his wife, her executors and administrators, and the other two thirds to other persons; and made his wife executrix of his will, and

Digitized by Google

ried. And the bill was brought against her by the next of kin to the testator, to have an account and distribution of the surplus of his personal estate not devised by the will; and two questions were made; 1. (which is the only one applicable to the case at bar) whether the devise to the wife of one third part of the term, was good, because it happened that she was not enceinte at all, and so the contingency upon which the devise to her was to take place, never happened. And the lord keeper delivered his opinion, that though the wife was not enceinte at the time of the will, yet the devise to her of such third part of the term, was good." No reasons are there assigned for the opinion.

The will is thus stated in *Jones* v. *Fulham*, 8 Vin. 103, *Devise*, *L*, *pl.* 53. "To my wife for her life, and after her decease, to such child as my said wife is now supposed to be with child and enceinte of, and his heirs for ever; provided always, that if such child as shall happen to be born as aforesaid, shall die before it has attained the age of twenty-one years, leaving no issue of its body, then the reversion of one third part to my said wife, and the other two thirds to my sisters A and B."

The case of *Gulliver* v. *Wickett* was determined as late as 19 *Geo.* 2, and was respecting a freehold estate under the same will.

The wife recovered notwithstanding she never was with child. And these decisions are supported by many great names and authorities, which may be found in the note to *Fulham* v. *Wickett*, Willes, 315, and other cases cited at the bar.

And so far as we may collect the reasons for the decisions from the numerous cases, they are put upon the following ground; that the devise to the child was void *ex post facto*, and should be considered just as if it had been void *ab initio*; as if it had been to a monk, (*Lord Paget's case*, 1 Leon. 194; Perk. 567; 9 H. 6 23,) or to one not *in rerum naturâ*, (ibid.) with remainder over, in such cases the remainder over takes place immediately.

And Lord *Thurlow*, in *Doo* v. *Brabant*, 3 Bro. C. C. 393, lays down the following rule as a corollary from the cases,

Digitized by Google

Carpenter v. Heard.

that where the prior estate is made to depend upon any described event, and the second is to depend upon the determination of that event, the first is not to be considered as a condition precedent, but, upon its failure, the second estate must take place." And if this rule should be applied to the case at bar, the judgment should be for the appellees. Lord *Thurlow* comments upon many of the cases, and was strongly inclined to support the doctrine deduced from *Jones* v. *Westcomb*, but he sent the case to the King's Bench, which decided the other way. That decision was in 1792. 4 T. R. 706. The case is thus abridged in the margin. "A bequeathed money to trustees in trust for B till she should attain twenty-one, and then to pay the same to her, and if B should die *under* twenty-one leaving a child or children, then in trust for such child or children; but if B should die *under twenty-one without leaving any child or children*, then in trust for C's three nieces. B attained twenty-one, married, had two children, and died in the lifetime of the testatrix; B's children took nothing by the will." B's children were the plaintiffs, and the defendants were the heirs at law. The cause was argued elaborately by Shepherd for the plaintiffs, and the case of *Jones* v. *Westcomb*, and other cases in accordance, were cited; but the court stopped the counsel for the defendants "Nothing (said Lord *Kenyon*) can be more clear than the words of this will. The devise is to S. Counsell when she shall attain the age of twenty-one, and if she shall die *under* twenty-one leaving children, then to those children; but she did not die under that age, and therefore nothing can pass to the grandchildren."

The case of *Calthorpe* v. *Gough*, 4 T. R. 707, note, was decided at the Rolls in 1789, and is in direct opposition to the case of *Jones* v. *Westcomb*, and in the opinion of Lord *Thurlow*, completely subverts it.

It is contended for the appellees, that the decision of the King's Bench in *Doo* v. *Brabant* was after the revolutionary war and not binding, but that the case of *Jones* v. *Westcomb*, and others confirming it, were before the revolution, and so binding upon the Court here. But we are to decide the case at bar according to the principles of the common law; and if

Digitized by Google

the decisions prior to the revolution go upon ground not tenable by the common law as it is now proved to exist, we are bound to adopt the common law as it is established by the best evidence and reasons which are now presented. Nor is it true that the rule for which the appellees contend, has been universally acknowledged. The case of *Jones* v. *Westcomb*, as has been already said, was decided by Lord *Harcourt*, without assigning any reasons, and we know the disposition of courts to yield to the authority of great names and cases, without much questioning the ground upon which the decisions were put. But the Court of Common Pleas was opposed to the decisions upon Waith's will, and the reasons are very elaborately and ably and clearly set forth in the opinion of *Willes* C. J., in his Reports, 303, *Fulham* v. *Wickett*, A. D. 1741. He lays down this proposition, that there is no book or case in which it is said "if the first devise be void, and there be a subsequent devise to another upon a contingency which never happens, that the subsequent devisee shall take the estate, though the contingency never happens, because the first devise is void. He proceeds to show that the devise of Waith to his wife and sisters was upon three contingencies; 1. if a child should happen to be born; 2. if it should die before twenty-one; and 3. if it should die without issue. If those contingencies should happen, the devise was to take effect. None of them did happen. No child was born; and the testator had not said what he would have done with the property in that event.

It seems to us, that any rule contradicting that position of Chief Justice *Willes* must be subversive of the right of disposing of property by will. Nobody questions that right, and nobody doubts that it may be exercised according to the will of the owner, although it may be whimsical, inexpedient or capricious, if the intent be clearly manifested and not inconsistent with the requisitions of the law. To say therefore that an estate given to one upon a contingency which does not happen, shall vest notwithstanding, is to defeat and not to execute the will. Whether the provision be reasonable or not, is not the question; did or did not the testator intend to have the estate vest absolutely, or only upon the happening of certain

Digitized by Google

Carpenter v. Heard.

events, is the matter to be considered. If the event that happened was not foreseen or provided for, but was a case omitted, then the rule is clear that the heir shall take; for, as has been said, the right of the heir is established by law, unless it be clearly taken away by the will. And it is very difficult to see how the heir can be disinherited by a contingent disposition which never took effect. It is no answer to say, that if the event that has happened had occurred to the mind of the testator, the same reasons which induced him to make the other disposition of the property on the contingencies which have failed, would have induced him to extend it, so as to include the case or event that has happened. This is no answer, because we cannot judicially know it. He might or he might not have done so. But we do judicially know the established right of the heir, and cannot permit him to be disinherited upon conjecture.

We return to the further consideration of cases which support this course of reasoning. We refer to *Holmes* v. *Cradock*, 3 Ves. 317, in 1797. There W. S. gave to the plaintiff as follows; "and if my son shall die, leaving my wife, without leaving a widow or any child after his death and my wife's, I give and bequeath to my kind friend Francis Holmes £500." The testator died in February 1773. The wife in July 1773. The son died in 1794, over twenty-one, without leaving a widow or child. The question was, whether as the contingency of his son's dying without widow or child, in the lifetime of the mother, had not happened, the legatee could take. And it was decided that he could not. And the cases of *Doo* v. *Brabant* and *Calthorpe* v. *Gough* were cited and considered as decisive. The case of *Denn* v. *Bagshaw*, 6 T. R. 512, was also cited; and we refer to it as a very strong one to prove that the heir shall not be set aside, unless the testator has clearly expressed an intention that he shall be.

The case of *Parsons* v. *Parsons*, 5 Ves. 581, A. D. 1800, was, in principle, like *Doo* v. *Brabant*. It was a bequest of stock to J. H., if she survived the testator's wife three months, and attained the age of twenty-one years, or if she so should survive the wife and be married, then for her sole use apart from her husband: but if she died before twenty-one, leaving lawful

Digitized by Google

issue, then her children were to take; but if she should die before three months next after the decease of his wife, under twenty-one and unmarried, then the testator directed that the legacy should sink into the residuum of his personal estate. The legatee J. H. married R. P. after the testator's death, and attained the age of twenty-one, had lawful issue, G. P., who was the plaintiff, but died *before* the wife. The master of the rolls felt bound by the words of the will to decide against the claim of the plaintiff, notwithstanding he believed that if the testator had foreseen the event that happened, he would have given her the funds. *Jones* v. *Westcomb* was cited for the plaintiff.

The case of *Humberstone* v. *Stanton*, 1 Ves. & Beame, 385, was so much like that at bar, that the learned counsel for the appellees were constrained to admit it to be decisive against them, if it were correctly decided. It took place in 1813.

It was a bequest of stock to a son of the testator, on his accomplishing his apprenticeship, "and in case he should die before he accomplished his apprenticeship," then the testator bequeathed the stock to another son and three daughters. The plaintiff was the representative of the residuary legatee. The son completed his apprenticeship and died a year or two before the death of the testator; and whether, by his death in the lifetime of the testator the bequest over took effect, was the question. And it was held, that this was a lapsed legacy, which fell into the residuum, and that the bequest over could not be maintained.

If in the case at bar Judith C. Lee had arrived at twenty-one years of age, and survived the testator, the legacy would have vested; but as she died before the testator, it lapsed. So in the case cited, if the son had survived the testator, the bequest would have taken effect; but as he died before the testator, it lapsed, notwithstanding he had completed his apprenticeship.

It has been argued, that the testator has manifested a general intent, that if Judith did not enjoy the estate, the other grandchildren should have it, and therefore the claim of the heir should be rejected.

Digitized by Google

Carpenter v. Heard.

So far as a general intent is to be inferred from other parts of the will, independently of the clauses upon which the appellees rely, it would seem that the intent was to give the same sums to the representatives of his son George G. Lee, as he did to the representative of his son William C. Lee. His bounty was bestowed *per stirpes*, and not *per capita*. To each branch he gave 17,000 dollars, and to each branch, one half of the residue of his estate. There were no cross remainders between the different branches, but there were cross remainders between the representatives of George G. Lee. If however it had happened that their legacies had all lapsed, they were not in that event bequeathed to Judith C. Lee, the representative of William C. Lee. Now so far as any argument may be drawn from this mode of disposing of his estate *per stirpes*, it would seem to be reasonably inferred, that if the bequest to Judith should lapse, it should not go over to the other branch, inasmuch as if the bequests to the other branch should lapse, they were not to go over to Judith. At any rate, it would be very difficult to maintain, that by the general intent it was plain that if the bequests to Judith should lapse the representatives of George G. Lee should have them, independently of the bequests upon which the appellees rely.

But if such had been his intent, why did he not say, that if in any event whatsoever the legacy to Judith C. Lee should fail, it should go over to the other grandchildren? Why trouble himself about contingencies, if he intended to make an absolute bequest over, in case the legacy to Judith should lapse?

We do not think that much, if any, sound argument or inference can be made by either party, from the general intent.

We must recur then to the particular bequests relied upon by the appellees. The other grandchildren were to take, if Judith died under twenty-one and unmarried. But she died after having attained the age of twenty-one. It is not for the Court to question the expediency of the contingency. It is not for the Court to say that the bequest was absolute, when the testator has said it should be contingent; or to say that it should vest, when the contingency has not happened.

For the reasons above stated, the Court do order, adjudge and decree, that the appellant is entitled to a share of the lega-

Digitized by Google

cies bequeathed to Judith C. Lee, to be distributed as lapsed legacies, and that the decree of the probate court be and hereby is reversed; and that the case be remitted to that court, to be settled according to this decree.

SHEPHERD LEACH *versus* WILDER WOODS.

After a verdict for the plaintiff in an action of trespass *quare clausum*, an exception was taken to the plaintiff's evidence of title, on a ground, in regard to which no instructions were given to the jury. Such instructions were important, but they were not asked for by the defendant previously to the verdict. It was *held* that the exception came too late; since, if it had been taken during the trial, the plaintiff would have had an opportunity to obviate the objection by further evidence.

If the respective owners of two adjoining lots of woodland not separated by a partition fence, cut trees beyond the boundary line; this mixed possession does not give to each the possession of the strip so cut over, as against a stranger, but the question of possession is to be determined by the true boundary line: nor can the owner of one of the lots regard as a stranger, a person who shows a *primâ facie* title to the other lot, although he do not trace his title to the original owner thereof.

TRESPASS *quare clausum*, for cutting trees in a parcel of uninclosed woodland, which was 50 or 60 rods in length, and about 12 rods in breadth at one end, and running to a point at the other.

At the trial, before *Shaw* C. J., the plaintiff gave in evidence a deed to himself from Caleb Butler, dated January 1, 1825, which included the land in question. This deed was executed by virtue of a license from this Court, authorizing the sale of the land, as the estate of certain minors. Butler testified, that after the execution of the deed, the plaintiff entered and held under it and had cut wood upon the land.

It was stated, that the land sold by Butler, had formerly belonged to one Green, and that the minors derived their title from him by devise; but neither party gave in evidence any title from Green.

The defendant produced in evidence certain deeds under which he derived his title to a lot of land, of which he contended the land in question was a part, through James Bennet. Much evidence was introduced by each party, tending to show that

Digitized by Google

Leach v. Woods.

the one or the other side of the gore of land in question was the true boundary between their contiguous lands, and to prove claims of title and acts of ownership, on the part, respectively, of Green, and of those under whom the defendant claimed.

The jury were instructed, that in the absence of proof of an exclusive, uninterrupted and adverse possession of the land for more than twenty years, the question must depend upon the title, the rule being, in such case, that the right of possession follows the right of property; that the deed from Butler to the plaintiff, which embraced the land in question, constituted a *primâ facie* title; but that if any of the deeds, under which the defendant claims, of an earlier date than that of Butler to the plaintiff, embraced the land, this would constitute an older and better *primâ facie* title.

It was left to the jury to determine, whether the deed to the defendant did include the land in question.

The jury having rendered a verdict for the plaintiff, the defendant contended, that the jury ought to have been instructed, that as there was evidence tending to show, that Bennet, under whom the defendant claimed, and Green, who was the former owner of the estate now held by the plaintiff, had respectively claimed the land in question, and had occasionally done acts of ownership therein, such claims and acts would be sufficient *primâ facie* evidence of title for either against a mere stranger, although, as between themselves, they constituted a mixed possession and would give neither a right as against the other: and that as the plaintiff did not prove that he derived any title from Green, and gave no evidence of title in himself prior to Butler's deed, he was to be regarded as a mere stranger until that time, and had no right to avail himself of any claims or acts of Green. This point was not presented till after the verdict; nor was the instruction asked for, when the cause went to the jury; but the counsel for the defendant stated, that they intended to present it, and believed that the attention of the Court and of the adverse party was called to it. As in the position in which the cause was placed by the evidence, it would have been important for the defendant, that such instruction should have been given, if by law he was entitled to it; the judge reserved it for the whole Court, to determine,

Digitized by Google

wnether, according to law and the practice of the Court, this point ought to be considered as reserved. If it ought to be considered as reserved, and if the jury ought to have received such instruction, then the verdict was to be set aside and a new trial granted.

Lawrence and *B. Russell* for the defendant. The title which the defendant derived from Bennet, who had a concurrent possession with Green of the land, was sufficient as against the plaintiff, who is to be considered as a mere stranger. *Newhall* v. *Wheeler*, 7 Mass. R. 189; *Langdon* v. *Potter*, 3 Mass. R. 215; *Codman* v. *Winslow*, 10 Mass. R. 146; *Commonwealth* v. *Dudley*, ibid. 403; *Brimmer* v. *The Proprietors of Long Wharf*, 5 Pick. 131; Stearns on Real Actions, 38. Oct. 18th, 1833

As the instruction contended for, was material, and arose necessarily out of the evidence in the case, the omission to instruct the jury on this point, is a sufficient ground for a new trial. *Dudley* v. *Sumner*, 5 Mass. R. 488; *Boyden* v. *Moore*, ibid. 365; *Page* v. *Pattee*, 6 Mass. R. 459.

S. Dana and *Farley*, for the plaintiff, cited *Catteris* v. *Cowper*, 4 Taunt. 547; *Jayne* v. *Price*, 5 Taunt. 326.

WILDE J. delivered the opinion of the Court. The exception taken to the plaintiff's evidence of title came rather too late. It ought regularly to have been taken during the trial; for if it had been, the plaintiff might have had an opportunity to go a step further back in his title, and connect himself with the title of Green. We have, however, considered the exception, and are of opinion that it would not have availed the defendant, if it had been seasonably made. The mixed possession, as it is called, of Green and Bennet, under the circumstances of the case, can have no legal effect in settling the question of possession between the present parties; that must be determined by their respective titles, or rather by the dividing line between their lots, which are contiguous. Bennet, under whom the defendant claims, never set up any claim to the Green lot, nor did Green claim any title to the Bennet lot; their cutting over the dividing line respectively, if in fact they did so cut, is to be imputed to mistake, and ignorance of the true running of the dividing line, and is not to affect the question of possession. And besides, the Oct. 17th

Digitized by Google

Leach v. Woods.

plaintiff is not to be regarded as a mere stranger, although he did not give Green's title in evidence. He showed a good *primâ facie* title to the Green lot, and it is not pretended there was any gore of land between that lot and the defendant's. So that, after all, the possession must follow the title, and on this ground it was rightly submitted to the jury.

Motion for new trial overruled.

CHARLES H. FLETCHER *versus* CALVIN WILLARD.

Where a vendor of chattels gave the vendee a writing in this form — "A. B. bought of C. D. &c. (enumerating the articles with their respective prices.) Received payment, C. D." — and the chattels were delivered to the vendee, but were returned to the vendor, and while in his possession were attached as his property, it was *held*, that upon the suggestion of the sale being fraudulent, the possession by the vendor was not conclusive evidence of fraud, and that it was competent to the vendee to prove by parol evidence, that the conveyance was a mortgage to secure a debt due to him from the vendor.

TRESPASS *de bonis asportatis* for divers cattle and farming utensils, to the value of $199.40. Plea, not guilty, with a brief statement setting forth that the defendant is sheriff of the county of Worcester, and that one of his deputies attached the chattels as the property of Joseph Fletcher, on divers writs against him, and subsequently sold them on execution, and that they were in fact the property of Joseph and not the property of the plaintiff.

At the trial, before *Shaw* C. J., it was conceded that the chattels, previously to January 14, 1830, were the property of Joseph and in his possession, at Hubbardston, in the county of Worcester, where he resided with his family and carried on a farm on his own account. The attachments were made on February 21, and March 9, 1831, and the chattels were then in the possession of Joseph. The plaintiff is Joseph's brother.

The plaintiff, to prove property in himself, gave in evidence a writing as follows: "Hubbardston, January 14th, 1830. Mr. Charles H. Fletcher bought of Mr. Joseph Fletcher, one pair of brown cattle, $50.00, &c., (specifying the cattle and farm-

Digitized by Google

ing utensils, and affixing the prices, amounting to $199.40.) Received payment, Joseph Fletcher."

The plaintiff then called Abijah Fletcher, another brother, who testified, that he lived at Westford; that the plaintiff, who lived at Lexington, came to Westford in February 1830, and requested him to go with him to Hubbardston and witness the delivery of the chattels, according to the foregoing bill of sale; that the bill of sale had been executed before, and that the plaintiff carried it with him to Hubbardston; that they arrived there in the evening, and the chattels were delivered the next morning; that the cattle were driven out into the street and delivered, and one of the wagons was drawn out for that purpose; that no money was paid, but the parties alluded to the sum of $200, which had been lent by the plaintiff to Joseph, at Lexington, a few weeks before, when the bill of sale was given, and for which Joseph gave his note to the plaintiff, bearing even date with the bill of sale, payable on demand with interest; that after the delivery the cattle were driven into the barn and left in the possession of Joseph; that Joseph was to keep them and take good care of them; that it was understood between Joseph and the plaintiff, that the chattels were to be the property of the plaintiff until Joseph should pay him the $200, and then they were to be Joseph's again; that the plaintiff said, if Joseph did not pay the money by the 1st of April, he should probably then be at Hubbardston, and should take the chattels, as he should want the money by that time; and that the chattels were to be the plaintiff's, unless Joseph should redeem them by the payment of the money lent.

The father of the plaintiff testified, that the plaintiff paid $200 to Joseph in January 1830, and took Joseph's note on demand, for that sum.

Much other evidence was given, bearing upon the question, whether the conveyance was void against creditors, as a conveyance made with an intent to defeat, delay or defraud the creditors of the grantor.

The chief justice proposed to instruct the jury, in point of law:—

1. That it was not competent to the plaintiff to show by

Digitized by Google

Fletcher v. Willard.

parol evidence, that a bill of sale of chattels, absolute upon the face of it, was made upon a condition or defeasance, to operate as a pledge or mortgage, as it would alter or vary the terms of a written contract by parol, which is inadmissible.

2. That as an absolute and definitive conveyance and transfer of property, it was void as against creditors, because there was no good and adequate consideration for such conveyance, and because the possession did not accompany and follow the bill of sale.

3. That if the facts reported were found by the jury, the plaintiff would not be entitled to recover in this action.

Thereupon the plaintiff became nonsuit. If these proposed instructions were wrong, and if upon the facts in the case, the plaintiff would be entitled to recover, the nonsuit was to be set aside and a new trial granted; if otherwise, a judgment was to be entered on the nonsuit.

Jan. 15th. *Hoar*, for the plaintiff, cited *New England Mar. Ins. Co.* v. *Chandler*, 16 Mass. R. 275.

F. Dexter and *Draper*, for the defendant, insisted, that as the plaintiff took the promissory note of Joseph Fletcher as security for the money lent, the sale of the chattels was without consideration, and therefore fraudulent as against creditors of Joseph; and that the bill of sale being unconditional, it was not competent to the plaintiff to vary this written contract, by parol evidence of a defeasance. *Flint* v. *Sheldon*, 13 Mass R. 443; *Stackpole* v. *Arnold*, 11 Mass. R. 27; *Colman* v *Packard*, 16 Mass. R. 39.

Oct. 17th. The *Court* said, that taking the testimony to be true, the plaintiff had proved a contract of sale and a delivery of the chattels; that permitting the chattels to continue in the possession of the vendor was not *per se* fraud, as against creditors, but merely evidence of fraud, which should be submitted to the jury; *Brooks* v. *Powers*, 15 Mass. R. 244; that the writing referred to as a bill of sale, was not, properly speaking, a bill of sale, but a bill of parcels; that it did not state the terms of the sale, but was in the nature of a receipt; that it was obvious, however, the property would pass absolutely to the plaintiff, according to this writing, unless it were explained; that parol evidence being introduced on the part of the defend-

Digitized by Google

ant, to show that the conveyance was fraudulent, all kinds of evidence were admissible to explain the true nature of the transaction; and that it was competent to the plaintiff to prove that the conveyance was a mortgage to secure a debt due to him from his brother Joseph.

Nonsuit taken off and new trial granted.

HENRY FLAGG *versus* SAMUEL H. MANN *et al.*

1 conveyed land, subject to incumbrances, to P, under a verbal (and therefore voidable) agreement on the part of P, that he would convey to L or to any other person at L's request. L afterwards applied to W and F for a loan upon a mortgage of the land, but they refused to make advances of money except upon an outright conveyance, and P and L and L's wife then joined in a quitclaim deed to W and F, who at the same time gave to L alone a bond to convey to him whenever within five years he should repay them all such sums as they should expend in discharging incumbrances and making improvements on the land; but there was no collateral promise on the part of L to repay such sums. It was *held*, that the deed and bond did not constitute a mortgage, but a sale with a right to repurchase upon condition.

L, not having complied with the condition within the five years, nor received a conveyance from W and F, gave a deed of quitclaim to the plaintiff and the defendant; and it was *held*, that the acceptance of the quitclaim did not estop either of the grantees, in a controversy between them, from alleging that nothing passed by the deed; and it was further *held*, that L had no interest in the land which could pass to the grantees and constitute them joint tenants or tenants in common, and consequently that one of them could not sustain a bill in equity against the other under *St.* 1823, *c.* 140, giving remedies in equity between joint tenants and tenants in common.

BILL in equity. The plaintiff sets forth in his bill, that he and the defendant Mann, on or about May 13, 1831, became and were jointly interested as tenants in common in a certain tract of land in Lowell, which was conveyed on or about June 13, 1823, by Samuel Frye, as guardian of his minor children, under a license of court, to Luther Richardson in fee; that Luther mortgaged the land to Goodman, Saville and Kent, on September 20, 1823, for $1229.70, with interest, and on August 13, 1824, for $2850.30, with interest; that afterwards the right of Luther to redeem the land was attached at the suit of Mellen and Norcross; and afterwards, on or about May 14, 1825, Luther, by his deed of release, conveyed the land to

Digitized by Google

Flagg v. Mann.

his brother Prentiss Richardson, to secure the payment of $170, upon an express (verbal) agreement between them, that Prentiss, upon the request of Luther, would reconvey to Luther or any other person; that on May 18, 1825, Luther's right to redeem the mortgages to Goodman, Saville & Kent, was sold and conveyed by a deputy sheriff, on Mellen and Norcross's execution, to John C. Proctor, for $1200; that on May 21, 1825, Proctor conveyed his right to Joshua Bennett; that Luther, being desirous of redeeming the land from Bennett and the mortgagees, applied to William W. Walker and Albigence W. Fisher for a loan of money for that purpose, and thereupon it was agreed between Walker, Fisher, and Luther, that Walker and Fisher should lend, advance and pay the sums due to Bennett and the mortgagees, and hold the land as security for the repayment of the money by Luther, and thereupon Luther and Prentiss, by their deed of release of May 6, 1826, conveyed the land to Walker and Fisher, and Walker and Fisher gave to Luther their bond of defeasance, of even date, conditioned to reconvey to Luther, his heirs and assigns, whenever at any time within five years Luther, his heirs or assigns, should pay to Walker and Fisher all such sums as they should legally pay in discharge of the incumbrances, with interest, together with such other sums as they might expend in such improvements and betterments as should be made on the land in that time, with the mutual consent of the parties; that in September 1826, and April 1827, Walker and Fisher paid the sums due to the mortgagees, and took assignments of the mortgages and of the sums of money thereby secured to be paid; that on May 15, 1826, they paid the sum due to Bennett and took an assignment of all his right in the land, whereby and by reason of the agreement between them and Luther they became seised of the land in mortgage and held it subject to the right of Luther to redeem it; that on May 6, 1825, Walker and Fisher leased a part of the land to Luther for five years, at an annual rent of one cent, unless Luther should redeem within that period, and that Luther has been in possession of that part ever since; that Luther, on or about May 13, 1831, by his deed of that date, granted, assigned and conveyed all his right in the land to the plaintiff and Mann, their heirs and assigns, and

Digitized by Google

the plaintiff and Mann agreed to pay therefor the sum of $9,000, part of which sum was to be applied in discharge of Walker and Fisher's demand, and the balance was to be paid to Luther, in case his title under Frye the guardian, should be found to be good; that the plaintiff and Mann became thereby interested in common, and entitled to redeem the land from Walker and Fisher, and it was agreed between the plaintiff and Mann, that they should redeem the land and perfect the title in themselves at their mutual expense, and for their mutual benefit; that Mann, on July 27, 1831, paid Walker and Fisher's demand and took a deed of release from them to himself, which enured to the benefit of the plaintiff as well as of Mann; that on November 15, 1831, the plaintiff requested Mann to state an account of what he had paid, and offered to pay him one half, and requested him to convey to the plaintiff an undivided moiety of the land, but that Mann refuses; that in July and August 1831, Mann and the defendant John R. Adams, who well knew of the agreement between the plaintiff and Mann, in order to perfect a title in themselves and share in the benefit thereof, and to deprive the plaintiff of his interest in the land, procured deeds of release to Adams from Herman A. Frye and others, claiming to have an interest in the land, and afterwards Adams released a moiety of the land to Mann, and Mann released a moiety to Adams; that afterwards Mann conveyed a moiety to the defendant Elisha Fuller, in fee, Fuller well knowing the premises, and that Fuller reconveyed to Mann in mortgage, to secure a part of the purchase money. The prayer of the bill is, that the deeds of Mann to Adams and Fuller may be declared void, and that on payment by the plaintiff, of one moiety of the sums expended by Mann in redeeming the land from incumbrances, Mann, Adams and Fuller, may be decreed to release and convey to the plaintiff one moiety of the land.

Mann, in his answer, denies that the plaintiff and himself ever were jointly interested, as tenants in common or otherwise, in the land; he denies that Walker and Fisher made a loan to Luther Richardson and took a mortgage as security therefor, and asserts that Luther and Prentiss made an absolute and unconditional sale to them, and that they gave Luther their bond with condition as set forth in the bill, but that the

Digitized by Google

Flagg v. Mann.

bond was not a defeasance; he admits that on or about May 13, 1831, the plaintiff and himself made a proposal to Luther to purchase of him all his right in the land, and to take an assignment of Walker and Fisher's bond, and that Luther executed a quitclaim deed and an assignment to them, but he denies that either the deed or the assignment was ever delivered, and alleges that the proposed arrangement was wholly abandoned.

The plaintiff filed a general replication.

Upon the hearing it appeared in evidence, that the land being subject to two mortgages made to Goodman, Saville & Kent, by Luther Richardson, and Luther's right in equity to redeem having been attached by Mellen and Norcross, he on May 14, 1825, released and quitclaimed all his right and title to the land to Prentiss Richardson; that on May 19, 1825, Luther's right in equity was sold and conveyed on Mellen and Norcross's execution to Proctor; that on May 21, 1825, Proctor quitclaimed the land to Bennett; that on May 6, 1826, Luther and his wife and Prentiss, by an unconditional deed of that date, quitclaimed to Walker and Fisher, and that at the same time Walker and Fisher executed a bond, of the same date, to Luther, conditioned to reconvey to Luther, his heirs and assigns, and also a lease for five years, as stated in the plaintiff's bill; that on May 15, 1826, Bennett executed a deed of quitclaim to Walker and Fisher; that on May 13, 1831, Luther gave a deed of quitclaim to Flagg and Mann, and, by a deed indorsed on Walker and Fisher's bond, assigned to Flagg and Mann "the premises within conveyed to me in mortgage, and all my right, title, interest and estate in and to the same;" and that on July 27, 1831, Walker and Fisher conveyed the land to Mann by a deed of quitclaim. Luther deposed that he made a proposition to Walker and Fisher to lend him money on the land as security, but they declined, and they proposed to pay all the incumbrances on the land and take a conveyance to them, on condition that Luther should pay them lawful interest on the amount they should pay, and allow them to receive the annual rents, and that they agreed, at the same time, to give Luther a bond, allowing him the right to redeem within five years. Walker and Fisher deposed tha

Digitized by Google

they refused to lend Luther money upon a mortgage, but offerred to purchase the land outright, and to give a bond to reconvey upon terms; and that the writings were to be so drawn as not to operate as a mortgage. Fisher also deposed, that the object of Walker and himself in having Luther execute the deed with Prentiss was, that Luther's wife might sign it, releasing her right of dower. Prentiss Richardson deposed, that when he received the deed from Luther, he did not expect to stand in his brother's way in disposing of the property at any time when he thought proper; that there was no agreement between them to that effect, but this was their mutual understanding; that he executed the deed to Walker and Fisher for his brother's benefit, and that he had previously held the land for his brother's benefit; and that the debt due to him from his brother had been otherwise secured to his satisfaction.

Jan. 1833, *in Suffolk.*

Rand and *Loring*, for the plaintiff, in order to show that the Court had equity jurisdiction in the case, under *St.* 1823, *c.* 140, contended that Flagg and Mann were tenants in common.

It appears from the evidence, that the deed from Luther and Prentiss Richardson to Walker and Fisher, and Walker and Fisher's bond to Luther, were a security for the repayment of money, and if the deed had been from Luther alone, they would manifestly constitute a mortgage. Co. Lit. 205 *a*, § 332; *Manlove* v. *Ball*, 1 Eq. Cas. Abr. 313; *S. C.* 2 Vern. 84; *Peterson* v. *Clark*, 15 Johns. R. 205; *Erskine* v. *Townsend*, 2 Mass. R. 493; *Kelleran* v. *Brown*, 4 Mass. R. 444; *Carey* v. *Rawson*, 8 Mass. R. 159; *Rice* v. *Rice*, 4 Pick. 349; *Newhall* v. *Burt*, 7 Pick. 159; *Conway's Executors* v. *Alexander*, 7 Cranch, 237. Any agreement to convert a mortgage into a conditional sale, is unconscientious, illegal and void. *Henry* v. *Davis*, 7 Johns. Ch. R. 40; *S. C.* 2 Cowen, 324; 1 Madd. Practice, 414 to 418; *Longuet* v. *Scawen*, 1 Ves. sen. 406; *Newhall* v. *Burt*, 7 Pick. 159. The fact that there was no collateral personal security on the part of Luther, is immaterial. There was an implied promise to repay Walker and Fisher. *King* v. *King*, 3 P. Wms. 360; *Howel* v. *Price*, 1 P. Wms. 291; 1 Powell Mortg. (Rand's ed.) 119 *a*, note K; *Cope* v. *Cope*, 2 Salk 449.

Digitized by Google

Flagg v. Mann.

Further, when they paid the sums due to Goodman, Saville & Kent, they did not release Luther, but took an assignment of the mortgages and notes against him. But even if there were not so much as an implied promise, the transaction would nevertheless be a mortgage. 1 Ves. sen. 406; 1 P. Wms. 291; 8 Mass. R. 159; 4 Pick. 349; 7 Pick. 159; 3 P. Wms. 358; 4 Mass. R. 444; *Goodman* v. *Grierson*, 2 Ball & Beatty, 274; *Conway's Executors* v. *Alexander*, 7 Cranch, 237, *et seq.*

Notwithstanding the conveyance to Walker and Fisher was by Luther and Prentiss, and the bond of Walker and Fisher was made to Luther alone, the transaction was a mortgage. It will be objected that Luther had no title when he executed the deed to Walker and Fisher, having previously conveyed to Prentiss, and therefore the bond to Luther alone could not operate as a defeasance. But Prentiss testifies that he held for his brother's benefit; and although, if this were a suit by Luther against Prentiss, the statute of frauds might be pleaded, yet in the present case, where the trustee does not choose to avail himself of the statute, the Court will enjoin a fulfilment of the trust. *Hampton* v. *Spencer*, 2 Vern. 288; *Cottington* v. *Fletcher*, 2 Atk. 155. Here the trustee not only admits the trust, but has in fact executed it by conveying to Walker and Fisher for the benefit of Luther. The conveyance by Prentiss and Luther is the same in effect, as if Prentiss had first quitclaimed to Luther and then Luther had quitclaimed to Walker and Fisher; and in a court of equity this course will be deemed to have been pursued. A defeasance made to a cestui que trust, instead of the trustee, will make the conveyance a mortgage. *Burgess* v. *Wheate*, 1 W. Bl. 155, 160, 162; *North* v. *Champernoon*, 2 Chan. Cas. 78. Further, a defeasance to one of two persons claiming under the same title, enures to both. It is sufficient that the bond to Luther was not made to a stranger. The defeasance was between all the parties in interest. Vin. Abr. *Defeasance*, *E*; Shep. Touch. 397; Lit. § 275, 276 277. Luther, therefore, being a mortgager and having conveyed his estate to Flagg and Mann, they became thereby tenants in common.

But aside from the question of mortgage, when Luther made

Digitized by Google

the quitclaim to Flagg and Mann, and assigned to them Walker and Fisher's bond, he had a valuable interest in the land, inasmuch as this court of chancery would have compelled a specific performance of the bond, if Luther had tendered the sum due to them, after the five years had elapsed; for time is not of the essence of the contract, where money is to be paid with interest and a forfeiture saved. Jerem. Eq. Jurisd. 461; *Seton* v. *Slade*, 7 Ves. 272; *Levy* v. *Lindo*, 3 Meriv. 84; *Jessop* v. *King*, 2 Ball & Beat. 94; *Barnardiston* v. *Fane*, 2 Vern. 366; *Grimston* v. *Bruce*, ibid. 594; *Hearne* v. *Tenant*, 13 Ves. 287; *Page* v. *Broom*, 4 Russell, 6; Sugd. Vend. c. 8. Since the *St.* 1817, c. 87, this Court, as a court of equity, may regard the bond of Walker and Fisher as a declaration of a trust, or as an agreement in writing to be specifically performed, and in either view it may be considered as giving Luther a right in equity to redeem. The transactions disclosed show a resulting trust for the benefit of Luther, and if so, the Court might enforce it even if there had been no bond. *Powell* v. *Monson &c. Co.* 3 Mason, 360; *Lench* v. *Lench*, 10 Ves. 517; *Philips* v. *Crammond*, 2 Wash. C. C. R. 445; *Boyd* v. *M'Lean*, 1 Johns. Ch. R. 582; *Wray* v. *Steele*, 2 Ves. & Beam. 390; *Hughes* v. *Edwards*, 9 Wheat. 495; *Botsford* v. *Burr*, 2 Johns. Ch. R. 409; *Dorsey* v. *Clarke*, 4 Harr. & Johns. 551; *Bartlett* v. *Pickersgill*, 1 Eden, 516; *Gregory* v. *Setter*, 1 Dallas, 193; *German* v. *Gabbald*, 3 Binn. 302. The purchase of this right of Luther, in the mode above mentioned, constituted Flagg and Mann tenants in common, or copartners.

Walker and Fisher having redeemed of Bennett by virtue of the deed from Luther and Prentiss to them, they, and the defendants who claim under them, are estopped to deny that they held under Luther. So also Flagg and Mann having taken a deed from Luther and an assignment of Walker and Fisher's bond, are estopped, at least as against each other, to deny that Luther had a title; and although it were merely a colorable title, the purchase of it would make them joint enants or tenants in common. Lit. § 476, 477, 667; *Adams* v. *Barnes*, 17 Mass. R. 365; *Fitch* v. *Baldwin*, 17 Johns. R. 161; Com. Dig. *Estoppel*, *A*, 3. Flagg and Mann pur-

Digitized by Google

Flagg v. Mann.

chased an imperfect title as such, intending to make it good, and the extinguishment by Mann, of adverse claims, enured to the benefit of both. *Van Horne* v. *Fonda*, 5 Johns. Ch. R. 388; Lit. § 307, 308, 470, 471, (and Coke's Commentary,) 472; Collyer on Partn. 96; *Fawcett* v. *Whitehouse*, 1 Russ. & Milne, 132; *Burton* v. *Wookey*, 6 Madd. 367; *Featherstonhaugh* v. *Fenwick*, 17 Ves. 312, 314; *Stewart* v. *Brown*, 2 Serg. & Rawle, 461; *Powell v. Monson &c. Co.* 3 Mason, 360, 364; *Wray* v. *Steele*, 2 Ves. & Beam. 386; *Philips* v. *Crammond*, 2 Wash. C. C. R. 441.

J. Mason and *F. Dexter* for the defendants. This Court have refused to assume equity jurisdiction by implication; and it is manifest that the question of jurisdiction is to be settled according to the principles of legal evidence and not by the rules of equity. *Tirrell* v. *Merrill*, 17 Mass. R. 121; *Kelleran* v. *Brown*, 4 Mass. R. 443; *Black* v. *Black*, 4 Pick. 237. In determining whether Flagg was a tenant in common with Mann, so as to have a remedy in equity, the Court must look at the legal title. *Manning* v. *Fifth Par. in Gloucester*, 6 Pick. 19; *Hunt* v. *Maynard*, ibid. 489; *Pratt* v. *Bacon*, 10 Pick. 123. Luther Richardson, by his deed to Prentiss, had parted with all his right in the land. He joined with Prentiss in the deed to Walker and Fisher, merely to enable his wife to release her dower. The bond given to him alone, by Walker and Fisher, did not constitute the transaction a mortgage. A bond to reconvey is allowed to operate as a defeasance, only to avoid circuity of action, and the performance of it must merely restore the parties to their former estate; but the effect of the bond in question would be to transfer the estate to one of the two grantors. Shep. Touch. 397; 2 Wms's Saund. 48, note; 1 Powell Mortg. (Rand's edit.) 4, note 1 The Court will regard the intention of the parties, which was, that this bond should not operate by way of defeasance.

It is said that Prentiss held in trust for Luther, but the deed to Prentiss was absolute in form, and parol evidence is not admissible to show that it created a trust. Prentiss cannot now come in and defeat a title derived from him, by acknowledging an old trust. 2 Hovend. Fr. 7

Digitized by Google

A defeasance made to a cestui que trust, is not at law a mortgage.

The defendants are not estopped to deny that Luther had any estate, the conveyance from him being by deed poll and being merely a release. Co. Lit. 47 *b*, 352 *a*, 363 *b*; *Small* v. *Procter*, 15 Mass. R. 495; *Somes* v. *Skinner*, 16 Mass. R. 357; Com Dig. *Estoppel*, *A*, 2; Shep. Touch. 53. No case has been cited where two, by taking under one deed, are estopped as against each other.

There was no loan from Walker and Fisher to Luther. To constitute a mortgage, there must be a debt, and a personal remedy against the mortgager. 1 Powell Mortg. (Rand's edit.) 5, note; *Goodman* v. *Grierson*, 2 Ball & Beat. 276; *Rice* v. *Rice*, 4 Pick. 349; *Conway's Executors* v. *Alexander*, 7 Cranch, 237.

A conveyance with a contract for a repurchase within a limited period, and not after, is supported in England in a court of equity, and also in this country. *Newcomb* v. *Bonham*, 1 Vern. 7, 213, 232; *Mellor* v. *Lees*, 2 Atk. 494; *Ensworth* v. *Griffiths*, 5 Bro. Parl. Cas. (Tomlins's edit.) 184; *Goodman* v. *Grierson*, 2 Ball & Beat. 276; 2 Hovend. Fr. 181; 1 Powell Mortg. (Rand's edit.) 138, 139; *Heister* v. *Fortner*, 2 Binn. 43; *Conway's Executors* v. *Alexander*, 7 Cranch, 237; *Reading* v. *Weston*, 7 Connect. 144.

Time was of the essence of the contract between Luther and Walker and Fisher, and a court of equity would not extend it. *Levy* v. *Lindo*, 3 Meriv. 84; *Hearne* v. *Tenant*, 13 Ves. 287; *Alley* v. *Deschamps*, ibid. 227; Jeremy on Eq. Jurisd. 461; *Seton* v. *Slade*, 7 Ves. 272.

Oct. 17th

PUTNAM J. delivered the opinion of the Court. The first inquiry to be made is, whether the complainant and respondents were tenants in common or joint tenants, within the meaning of the statute of 1823, *c.* 140, § 2, an act for giving further remedies in equity. It provides that this Court "may hear and determine in equity all disputes between copartners, or joint tenants and tenants in common, and their legal representatives, in cases where there is no adequate remedy at law, and may thereupon compel such discoveries and disclosures, and make such orders, injunctions and decrees, as equity in such cases shall seem to require."

Digitized by Google

Flagg v Mann.

The complainant contends that he and Mann became tenants in common in virtue of the deed of Luther Richardson, dated May 13, 1831, and of an assignment of the same date to them; by the former of which Luther R. remised, released and for ever quitclaimed the estate in dispute to Flagg and Mann, and by the latter, (which was written on the back of the bond of Walker and Fisher to Luther R.) he "granted, assigned, released and conveyed to them the premises within conveyed to him in mortgage and all his right, title, interest and estate in and to the same."

The respondents contend that the parties did not become tenants in common in virtue of those instruments.

From the views we have taken of this cause, it will not be necessary for us to determine whether the deed of quitclaim was delivered absolutely or not, or whether the negotiation was abandoned or not. Let it be supposed that the deed was delivered, and that the bond was delivered at the same time absolutely, and that the negotiation was not abandoned.

We then proceed to inquire, whether Luther Richardson then (viz. on the 13th of May, 1831) had any right or interest in the real estate described in the bill, which could pass to the grantees, Flagg and Mann, whereof they could be joint tenants or tenants in common.

It is certain that Luther Richardson had no right as the original mortgager, for that right vested in Prentiss Richardson by the deed of Luther on the 14th of May, 1825. That deed was made after Luther's right in equity had been attached, which right was taken and sold by the officer for the attaching creditor, and by assignment came regularly to Bennett. So Luther's legal as well as equitable title was gone completely. The legal title was then in the mortgagees. Bennett, the assignee of the right in equity, had the right to redeem the mortgages, and Prentiss Richardson had a right to redeem the right in equity that Bennett held. The lease for five years for a nominal rent, had then expired by its own limitation, seven days before Luther made his deed to Flagg and Mann. All right and interest was gone from Luther completely, unless the verbal agreement set forth by the plaintiff, between Luther and Prentiss, preserved any right for Luther

Digitized by Google

But we think it perfectly clear, that such verbal agreement was within the statute of frauds. The deed to Prentiss was absolute in its terms. No parol evidence is admissible, to show that it was upon a mortgage or in trust for the grantor. If it were voidable by the creditors of Luther on the ground of fraud, they have not avoided it, and it was good betw the original parties. A short time before the expiration of t.. . ir within which there was a right to redeem the right in equity which Bennett held, Luther made application to Walker and Fisher for assistance. It appears that Prentiss Richardson was willing to make any conveyance which Luther should desire. The negotiation between Luther and Walker and Fisher, concerning the mortgage or sale (whichever it may be) then took place. There is no evidence that Walker and Fisher had any knowledge of any parol trust existing between Prentiss and Luther in regard to that deed, if any ever did exist.

At that time, viz. May 13, 1831, Prentiss Richardson, and he only, had the right to extinguish the claim of Bennett; which would enable him to redeem the outstanding mortgages.

When Luther Richardson and Walker and Fisher had agreed upon the sale or the mortgage, (which ever it may be,) *Prentiss* conveyed to Walker and Fisher all his right, and Luther and his wife joined in the deed. It appears from the testimony of Fisher, that the object which Walker and Fisher had in having Luther join in the deed, was, that the wife of Luther should release her right of dower in the estate. The deed of Prentiss and Luther to Walker and Fisher, dated May 6, 1826, gave to the latter a right to redeem the right in equity from Bennett, and the right to redeem against the mortgagees. And they gave the bond *to Luther* on the same day. So the question is narrowed to the consideration of the right which Luther acquired under and in virtue of the bond.

The bond recites the deed, and provides for a reconveyance to Luther, his heirs and assigns, whenever at any time within five years he or they should pay Walker and Fisher such sums as Walker and Fisher should legally pay in discharge of the incumbrances, with such other sums as they should expend n improvements and betterments.

If that transaction constituted a mortgage, then Luther, on

Digitized by Google

Flagg v. Mann.

May 13, 1831, had a right in equity of which his grantees, Flagg and Mann, became tenants in common by his deed to them of that date. If it was not a mortgage, but a sale, with a contract on the part of the grantees for a conditional repurchase by Luther, then Luther, on May 13, 1831, when he conveyed to Flagg and Mann, had no right at all, as he did not within the term of five years pay the money to Walker and Fisher, which they had paid and laid out for the incumbrances and betterments.

It is very well settled, that, if this is to be taken as a security for a *loan*, no agreement of the parties could impair the right of redeeming, which is incidental to mortgages. The authorities are too clear to that point, to require particular citation. The plaintiff sets it forth as a mortgage; the defendants deny it; and we must go to the evidence to ascertain the truth.

According to the testimony of Luther Richardson, he proposed that Walker and Fisher should *lend* the money, and take the estate as security, but they declined. According to Fisher's deposition, *they refused to lend* the money, but proposed to Luther to purchase his estate *outright*, and to give a bond to reconvey upon terms; and it was expressly agreed, that it should not be or operate as a mortgage. Walker swears that he and Fisher refused to let Luther have the money at any rate upon a mortgage, and unless they could buy the estate of him *outright*. It was then incumbered to nearly or quite the full value, and the only consideration which Luther received for the conveyance to Walker and Fisher, was the right of redeeming or repurchasing the estate within five years.

There was no collateral undertaking on the part of Luther to pay the money which Walker and Fisher should advance, in the five years; so there was no mutuality. And this fact, though not conclusive, is to be taken into consideration in ascertaining whether the transaction was a mortgage, or a sale with a contract for a repurchase upon strict terms. *Goodman* v. *Grierson*, 2 Ball & Beat. 279; *Conway's Executors* v. *Alexander*, 7 Cranch, 237. It is a fact deserving of much attention, and affects the equitable rights and claims. For if, on

Digitized by Google

the one hand, in case the estate should depreciate in value, Walker and Fisher must have borne the loss, they having no contract from Luther for the repayment of the money; it would seem equitable and just on the other, that they should have the benefit of any subsequent advance of the estate in value, if the money were not paid within the stipulated period.

It was a contract very favorable to Luther. If within the five years he could obtain a dollar more than the money advanced in discharge of the incumbrances and expended in the improvements, by Walker and Fisher, with lawful interest, he might secure it for his own benefit; if the estate should fall in value, they had no remedy.

And there is no room from the evidence, to impute any oppression or undue advantage on the part of Walker and Fisher. On the contrary, the parties to the bond, as it appears to us, treated with each other fairly and with a full understanding of their rights.

It was contended however, that assumpsit might be maintained by Fisher and Walker for the money advanced. But that right would depend upon the question, whether there was a loan. If there were a loan and a mortgage, the debt would be implied; but there would be no such implication, if there were no loan and no mortgage.

To return to the question, was this transaction a conveyance with a defeasance constituting a mortgage. Lord *Coke* (Co. Lit. 236) says, that *defeasance* comes from "*defaire*, i. e. to defeat or undo, *infectum reddere quod factum est.*" Where it relates to lands, it must be executed at the same time with the conveyance; because the conveyance is an executed, not an executory contract. It is to be considered as if it were annexed to or inserted in the same deed, and contains the condition upon the performance of which the estate then created may be defeated. So it must be between the same parties. 2 Bl. Com. 327; Shep Touch. 397; *Fowell* v. *Forrest*, 2 Saund. 48; Com. Dig. *Defeasance*, *B* 2, *C*. It is to be ascertained by the principles of the common law. *Kelleran* v. *Brown*, 4 Mass. R. 445. It must be of as high a nature as the thing o be defeated.

If this bond to Luther is tested by these rules, it will be

Digitized by Google

Flagg v. Mann.

difficult to maintain that it can be considered as a defeasance to the deed of Luther and Prentiss. Assuming that it was sealed and delivered at the same time, it is not between the same parties.

And we have not found any case where the bond to one should be construed as defeating the deed made by two. If it operated as a defeasance, it would have revested the estate in both the grantors; which would be directly contrary to the intent declared in the bond. There is no difference in regard to the effect, where the defeasance provides that upon the payment of money or the performing of the condition therein set forth the deed shall be void, or that the estate shall be conveyed to the grantors. The form of conveyancing is in both ways, but the uniform effect in each would be to revest the estate in the grantors.

But upon the whole evidence we are clearly of opinion that this was a sale with a right to repurchase upon condition, and not a mortgage to secure a loan. *There was no loan.* As has been said, Walker and Fisher refused to lend. If this refusal were colorable and a mere contrivance to defeat the redeemable qualities of a mortgage, it should be disregarded, as a fraud upon the law. But the facts proved in the case leave no doubt in the mind of the Court, that these parties concluded their bargain upon an outright sale, and not upon a mortgage. The pecuniary circumstances of Luther Richardson were bad. Walker and Fisher had no regard to his personal responsibility. They regarded the value of the estate merely, and took it subjected to the right granted to Luther to regain it upon strict terms. And such a contract is known and regarded in law, and is as much to be enforced by legal process, as is a mortgage, or any other contract or agreement. A decision to the contrary, would essentially, unnecessarily and unjustly fetter and impair the right to manage and dispose of property, according to the wants and interests of the owners. "To deny (says Chief Justice *Marshall* for the whole court, *Conway's Executors* v. *Alexander*, 7 Cranch, 236) the power of two individuals, capable of acting for themselves, to make a contract for the purchase and sale of lands defeasible by payment of money at a future day, or in other words, to make a sale with

Digitized by Google

a reservation to the vendor of a right to repurchase the same land at a fixed price at a specified time, would be to transfer to the court of chancery, in a considerable degree, the guardianship of adults as well as of infants." "A conditional sale, if really intended, is valid. The inquiry in every case must be, whether the contract in the specified case is a security for the re-payment of money, or an actual sale." 1 Powell on Mortg. (Rand's ed.) 137 *a*, and note 1.

The bond contains no acknowledgment of any preëxisting debt. It was not between the same persons who were parties to the deed. There was no remedy against the person for the money that should be advanced. On the contrary, the refusal to lend on a mortgage, and the agreement to make a purchase from Luther and Prentiss, with a right in Luther to repurchase upon specified terms, within a fixed time, are, we think, clearly proved. Those terms were not fulfilled within the time, and thenceforth Luther ceased to have any estate, legal or equitable. 2 Hovend. on Frauds, 181, 182.

It is contended, however, that Flagg and Mann, by accepting the deed of Luther Richardson, admitted that they became tenants in common, and that this estoppel is binding upon Mann and the other defendants who claim under him.

The reason which governs estoppels is, that after a man has, by his own deed or act *in pais*, admitted a fact to be true, he shall not be permitted to contradict it. This is a necessary rule, which is constantly enforced in the course of judicial inquiries. It applies as well to the law, as to the facts which are to be ascertained. Matters which have been alleged or admitted by a party to be true, shall not be by him disproved.

The material inquiry now is, whether Flagg and Mann were joint tenants or tenants in common in this real estate. Has the defendant, Mann, admitted the fact, by accepting the deed from Luther Richardson? The deed is a release and quitclaim, in common form, of all the right, title and interest of the grantor. It does not affirm that he had any. How then can the grantees be supposed conclusively to admit that he had? The estoppel ought to be certain to every intent, and it should not be alleged by way of inference or argument. If the admission should be coëxtensive with the grant, it

Digitized by Google

Flagg v. Mann.

would be but conditional, viz. that if the grantor had any right or interest, which passed by his deed, it vested in the grantors as tenants in common. In other words, they would be bound by the legal effect and operation of the deed. To carry the doctrine of estoppel farther, would be to assume, without evidence, that the party has admitted the controverted facts. Shep. Touch. 53; Co. Lit. 363 *b*, § 693. Thus if a man be disseised, and having a right of entry, takes back an estate from the disseisor, by deed poll, it is a remitter to the disseisee. He shall be in under his elder and better title. He shall not be estopped from showing and maintaining his elder title, by reason of his having accepted an estate by deed poll from the disseisor.

Again, it is consistent with the deed, to plead and prove that nothing passed by it, or that the grantor was not seised at the time. Com. Dig. *Estoppel*, *E* 3, citing 1 Roll. Abr. 862, *l* 35. If a deed of feoffment be enrolled in a court of record, the party may say that nothing passed by the deed.

It is a very common thing for one, in order to avoid litigation, to purchase or extinguish claims to land which the grantee might not think to be valid, and which the grantors would not warrant; and deeds of release and quitclaim of all the right &c. are used by the parties. It would seem to be unjust and contrary to the intent of the grantees, to affect their rights, by their acceptance of such deeds, beyond the rights and interests which should actually pass by the same.

We are therefore of opinion, that the defendant Mann, and the other defendants (who all claim under him), are not estopped by the acceptance of the deed from Luther, to show that he had no interest in the estate at the time when the release and quitclaim was made.

And it appears too, clearly, that he had not any right or interest in or to the estate, for the reasons before stated.

Our jurisdiction in relation to this suit is to be regulated by the statute of 1824 before cited. The disputes must be between copartners, joint tenants or tenants in common. It is not sufficient that the parties intended to become so. They must be so in fact. We think it very clear that Flagg and Mann intended to become tenants in common of the land, and

Digitized by Google

f we were at liberty to proceed according to the intention, and were not limited by the fact, we should go on and decide the case according to such equitable rules as govern courts having general equity jurisdiction. But we know with what caution the legislature have granted the equity jurisdiction, and have repeatedly said that we shall not assume by construction, any power which does not necessarily arise from the grant. It is not necessary for us to consider what a court having a general jurisdiction in equity would do in the premises.

Wherefore, as the plaintiff has failed to prove that he and Mann were interested as tenants in common or as joint tenants in the land, or in any right or title or interest in the same, our opinion is that we have no jurisdiction of the matters of complaint set forth in the bill. The Court therefore order and decree that it shall be dismissed; but under the circumstances we are of opinion that no costs shall be taxed for either party.

ELIHU CUTLER *versus* THE MIDDLESEX FACTORY COMPANY.

Under *St.* 1808, *c.* 65, regulating manufacturing corporations, no action can be maintained by a manufacturing corporation, either against a stockholder or against his executor, to enforce the payment of assessments laid on his shares; and consequently such corporation cannot set off a claim for unpaid assessments, in an action against it by the executor of the stockholder, for a debt due to the stockholder.

ASSUMPSIT upon a promissory note, dated June 27, 1826, for the sum of $1181·76 made by the defendants, and payable to Aaron Eames, the plaintiff's testator. The declaration contained also the money counts.

The defendants filed an account in set-off, in which they claimed to set-off the assessments, amounting to the sum of $271, due on two shares in the corporation, alleged to have been owned by the testator.

At the trial, before *Putnam* J., the plaintiff offered evidence to prove that the shares had been transferred by the testator by deed, before the assessment was laid. The defendants contended that the transfer was not sufficient, because

Digitized by Google

Cutler v. Middlesex Factory Co.

the deed had not been recorded in a book kept by the clerk of the corporation for that purpose.

The defendants were incorporated by *St.* 1811, *c.* 66. The name of the corporation was changed by *St.* 1819, *c.* 97.

The defendant was defaulted. Judgment was to be entered as the Court should determine upon the facts.

Oct. 16*th.* *Hoar* for the defendants.

Keyes for the plaintiff.

Oct. 17*th.* SHAW C. J. delivered the opinion of the Court. The question arises upon an account filed in set-off, in which the defendants claim to set-off assessments due on certain shares, alleged to have been owned and held by the testator in his lifetime. The executor contends, that the testator had duly transferred these shares, and was not the proprietor of them when the assessment was laid. The case has been argued mainly upon the question whether the assignment was valid to transfer these shares; but we think it involves the more general question, whether supposing the transfer not valid, the estate of the testator in the hands of the executor is liable for assessments. A set-off is substantially a cross action. The inquiry then is, whether if the defendants were plaintiffs, they could maintain an action against the executor to recover the assessments; and the Court are all of opinion, that they could not. The only compulsory mode, which a manufacturing corporation has, to enforce the payment of assessments, is by sale of the share. By law, the assessment is a *lien* on the share. The executor has an option to redeem the share for the benefit of the estate, by payment of the assessment, as he would have to redeem any other pledged property; and this option he will exercise according to his views of the interest of the estate. This corporation was established by *St.* 1811, *c.* 66. The name was changed by *St.* 1819, *c.* 97, but its character and responsibility were not thereby changed. The liability of this corporation depends upon the *St.* 1808, *c.* 65, the original act regulating manufacturing corporations, to the provisions of which express reference is made in the original act of incorporation. By virtue of this act, the remedy to enforce the payment of assessments, was by sale of the share; no action would lie, either against the proprietor himself or his

Digitized by Google

executor, and, of course, the claim of the defendants to set-off these assessments, cannot be maintained. See *Ripley* v. *Sampson*, 10 Pick. 372.

Cutler v. Middlesex Factory Co.

Judgment for the plaintiff.

COMMONWEALTH *versus* AARON LOCKE.

A party indicted for a capital offence is entitled, as a matter of right, to a list of the witnesses examined as to his case before the grand jury.

INDICTMENT for murder. Upon a motion on the part of the prisoner, that he should be furnished with a list of the witnesses examined as to his case before the grand jury, *Austin*, attorney-general, objected to the claim as a matter of right, and said that in *Commonwealth* v. *Knapp*, 9 Pick. 498, a list was ordered to be furnished, because it had been promised by the solicitor-general. But it was resolved by the *Court*, that, on the general principles of justice and sound policy, the prisoner was entitled to know what persons had been examined as witnesses. The motion was accordingly granted.

41 *

Digitized by Google

Benjamin Wheeler *et al. versus* Calvin Willard.

In an action of the case against a sheriff for a neglect of duty in not paying over money collected on an execution in favor of the plaintiffs the declaration alleged that the execution was delivered to the defendant; that he ought to have satisfied it out of moneys of the debtor, arising from the sale of his property made by the defendant, which property was attached by the defendant on the plaintiffs' original writ; and that the moneys arising from such sale were more than sufficient to satisfy the execution after paying off all previous attachments. It was *held*, that in order to bring the case within the *St.* 1804, c. 83, § 6, it should have been averred, that the sale was made by the defendant *virtute officii*, and that the plaintiffs' execution was delivered to the defendant before he had paid over the surplus money to the debtor.

In an action on the case against a sheriff for a neglect of duty by Fisher, one of his deputies, the declaration alleged, that a writ had been delivered by the plaintiffs to Fay, another of his deputies, who attached thereon an equity of redemption and personal property belonging to the debtor; that the plaintiffs' execution was delivered to Fay, who satisfied it in part by a sale of the personal property, and afterwards presented it to Fisher, who had made a simultaneous attachment of the same equity on a writ in favor of another creditor of such debtor and had sold it on such creditor's execution; that Fay demanded of Fisher one half of the proceeds of the sale, to be applied to the payment of the plaintiffs' execution, having before and at the time of the sale notified to Fisher the simultaneous attachment under the plaintiffs' writ, and requested him to retain one half of such proceeds, to be applied to the payment of the plaintiffs' execution; yet, that Fisher not regarding the notice, nor the demand, the plaintiffs had wholly lost the benefit of their attachment of the equity. It appeared, that one half of the proceeds of the sale much exceeded the amount due on the plaintiffs' execution. It was *held*, that the declaration was insufficient, inasmuch as there was no averment, that Fisher had any surplus money in his hands at the time of the demand by Fay, nor that the plaintiffs' attachment had been returned into court, nor that the plaintiffs' execution was delivered to Fisher.

Case against the sheriff of the county of Worcester, for neglect of duty, both by him and by his deputies.

The first count in the declaration alleges, that, on the second Monday of June 1829, the plaintiffs recovered judgment in the Court of Common Pleas, holden at Concord, against Artemas Fay of Southborough in the county of Worcester, for the sum of $336.84 damages, and $14.05 costs; that on June 26, 1829, the execution was issued and delivered to the defendant, that the defendant undertook to execute the same, according to law, and "ought to have satisfied it out of moneys of the said Fay arising from the sale of the said Fay's property made by the said Willard," on May 5, 1829, which property

Digitized by Google

was attached by Willard on the plaintiffs' original writ; "that the moneys arising from the sale of Fay's property as aforesaid were more than sufficient to satisfy the plaintiffs' judgment, after paying off all previous attachments," and that there, on July 1, 1829, the plaintiffs demanded of the defendant, the money then in his hands arising from the sale, in satisfaction of their execution; but that the defendant has unreasonably neglected and refused to pay the amount of the execution out of such money. Whereby and by force of the statute, &c., the defendant has forfeited to the use of the plaintiffs five times the lawful interest of said money, in addition to the principal aforesaid collected by him.

The second count alleges, that the original writ against Artemas Fay was delivered to Francis B. Fay, one of the deputies of the defendant; that Francis B., on January 12, 1829, by virtue thereof, attached all the right, title and interest which Artemas had in and unto certain parcels of real estate, which, together with personal property attached on the writ, were of the value of $1000; that the plaintiffs recovered judgment, and that the execution was delivered to Francis B. who undertook to levy the same; that Francis B. sold the personal property attached, which satisfied the execution in part, viz. to the amount of $150; that Francis B. afterwards, and within thirty days from the rendition of the judgment, presented the execution to Jabez G. Fisher, another deputy of the defendant, who had made a simultaneous attachment of the same real estate on a writ in favor of Perley Whipple, and had sold the rights in equity which Artemas Fay had to redeem the same, on Whipple's execution, for the sum of $975; that Francis B. demanded of Fisher one half of the proceeds of the sale, to be applied to the payment of the plaintiffs' execution, having before and at the time of the sale notified to Fisher the simultaneous attachment under the plaintiffs' writ, and requested Fisher to retain one half of the proceeds of the sale in his hands, subject to the plaintiffs' attachment, to be applied in payment of their execution; yet that Fisher not regarding the notice nor the demand, the plaintiffs have wholly lost the benefit of their attachment of the real estate; whereby and by force of the statute, the defendant became liable to pay the plaintiffs

Digitized by Google

Wheeler v. Willard.

the balance of their execution and thirty per cent. interest thereon, from the time of Fisher's refusal to pay one half of the proceeds of the sale to Francis B. for the purpose of discharging the execution.

The third count, after alleging the attachments, the issuing of the executions, the sale by Fisher and the demand by Francis B. of one half of the proceeds of the sale, &c., avers, that after the return of the plaintiffs' execution, they demanded of Francis B. the balance of the same; yet, that neither Fisher nor Francis B. has ever paid them such balance, which is still unsatisfied; and that the defendant has unreasonably neglected and refused to pay the same; whereby and by force of the statute, he is liable to pay them such balance and five times the lawful interest thereon from the time of the plaintiffs' demand.

The defendant demurred generally to the declaration.

Oct 21st, 1831

Hoar and *Mellen*, for the defendant, cited as to the insufficiency of the declaration, *Drowne* v. *Stimpson*, 2 Mass. R. 444; *Soper* v. *Harvard College*, 1 Pick. 177; *Salem* v. *Andover*, 3 Mass. R. 436; *Wrentham* v. *Attleborough*, 5 Mass. R. 434; *Peabody* v. *Hoyt*, 10 Mass. R. 36; Com. Dig. *Pleader*, C 22; *Hale* v. *Dennie*, 4 Pick. 501; 2 Chitty on Pl. 342 to 345; Amer. Precedents of Decl. (Oliver's edit.) 363 to 365; *Dennie* v. *Hamilton*, 16 Mass. R. 402.

Buckminster, for the plaintiffs, cited as to an objection that there was no allegation in the second and third counts that the plaintiffs' attachment had ever been returned into court, *Waite* v. *Briggs*, Salk. 565. It is contended, that there is no averment, that Fisher had any surplus money in his hands at the time of the demand, and so the case is not brought within the operation of *St.* 1804, *c.* 83, § 6; but we say, that the plaintiffs were entitled to one half of the proceeds of the sale of the equities, by virtue of the common law. *Shove* v. *Dow*, 13 Mass. R. 529. The statute applies only where there are prior and subsequent attachments; not where the attachments are simultaneous. As to the objection, that the second and third counts contain no allegation that the plaintiffs' execution was delivered to Fisher, it is sufficient for us to say, that Francis B. Fay had attached personal property, and we were therefore

Digitized by Google

obliged to put the execution into his hands in order that he might levy on such property, and we could not compel him to deliver it up to Fisher. These counts are therefore not deficient in this respect. If it was the duty of Francis B. to deliver over the execution, then the defendant is clearly liable to the plaintiffs for the damages; and all the facts necessary, in this view of the case, are alleged. *Thompson* v. *Marsh*, 14 Mass. R. 269.

Oct 19th, 1833.

WILDE J. delivered the opinion of the Court. This is an action of trespass on the case against the sheriff of the county of Worcester, for neglect of duty, both by him, and by one of his deputies, in not paying over money collected on the plaintiffs' execution against one Fay. The defendant demurs to the declaration, and we are to decide whether any one of the several counts be in law sufficient to maintain the action. The plaintiffs' counsel rely principally upon the first count, in which the plaintiffs' judgment against Fay is set out, with an averment that execution thereon was delivered to the defendant, and that he undertook to execute the same according to law, and ought to have satisfied it out of the moneys of Fay arising from the sale of his property by the defendant, which, the plaintiffs aver, was attached on their original writ, and that the proceeds of sale were more than sufficient to satisfy their judgment, after paying off all previous attachments. But the first count does not show how, or by what authority, this sale was made. It is not averred that the defendant acted *virtute officii*, and such an averment we hold to be material to the maintenance of the action, and the omission of it is not to be supplied by intendment. Com. Dig. *Pleader*, *C* 22; Bac. Abr. *Pleas and Pleading*, *A* 1, *B* 1; *Drowne* v. *Stimpson*, 2 Mass. R. 444. The declaration must set forth all the material grounds of action fully and with certainty, and if on the facts stated two intendments may be made, it shall be taken most strongly against the plaintiff. The pleader in this case relied undoubtedly on the *St.* 1804, *c.* 83, § 6, which directs in what manner the surplus money arising on sales by sheriffs shall be applied, after satisfying the executions on which the property was taken and sold; but the allegations in the first count are insufficient to bring the case within the purview of that statute. To bring

Digitized by Google

Wheeler v. Willard.

the case within the statute, it should have been averred that the sale was made officially; and also that the plaintiffs' execution was delivered to the defendant before he had paid over the surplus money to the judgment debtor. Both these averments are necessary, and the omission of them is fatal. *Soper* v. *Harvard College*, 1 Pick. 177; *Salem* v. *Andover*, 3 Mass. R. 436; *Wrentham* v. *Attleborough*, 5 Mass. R. 434.

The other two counts are clearly deficient, and the plaintiffs' counsel have not attempted to support them.

In each of these latter counts, it is averred that the plaintiffs' execution was delivered to Francis B. Fay, one of the defendant's deputies, and that he satisfied the same in part by the sale of personal property, and demanded of Fisher, another of the defendant's deputies, the half of the proceeds of the sale of certain equities of redemption, which had been sold on an execution in favor of one Whipple, and had been simultaneously attached by him and the plaintiffs, and that the said Fisher not regarding the notice and demand, the plaintiffs have wholly lost the benefit of their attachment. The negligence is charged against Fisher; but there is no averment that he had any surplus money in his hands at the time of the demand, or that the plaintiffs' attachment had ever been returned into court; or that he had been so informed by Francis B. Fay. The demand was not for any surplus in his hands, but for one half of the amount of sale, to which the plaintiffs were not entitled, as it would much exceed the amount due on their execution. And there is no averment that the plaintiffs' execution was delivered to Fisher.

These are material defects, and the whole declaration must be adjudged insufficient.

Digitized by Google

MOSES FISKE *versus* FRAMINGHAM MANUFACTURING COMPANY.

The defendants, being owners of a manufactory and of a pond above it, and having purchased of the plaintiff the right of drawing off the water from the pond, through his land, made a written contract with one B, by which B was to run the defendant's mill for one year, and to manufacture for them, at a specified price, cotton furnished by them, and to keep the mill in good running order at his own expense, except the main gearing, which was to be repaired by the defendants if necessary; and no rent was to be charged by the defendants, and they were not to be called upon for any expense unless the main gearing should fail or some injury should arise to the dam; and six or seven acres of land where the factory stood, with the factory houses, blacksmith shop, &c., were to be used by B. In an action against the defendants for an injury sustained by the plaintiff in consequence of B's letting off the water from the pond so rapidly as to overflow the plaintiff's land, it was *held*, that B was the lessee and not the servant of the defendants, and consequently that they were not responsible for the injury complained of.

THIS was an action on the case. At the trial, before *Wilde* J., it appeared that the plaintiff was the owner and occupant of a tract of meadow land in Natick, situated below Wansemog pond and above the defendant's manufactory in Framingham. The defendants were the owners of the pond, and had purchased of the plaintiff the right of drawing off the water from the pond, through his land, to be used by the defendants and their assigns as they might see fit; and the plaintiff's deed authorizes them, at all times, to enter on any of his lands for the purpose of doing all acts that may be necessary to the full and free enjoyment of the right granted, and particularly to dig out mud or other soil for that purpose, and to leave the same on his land.

The plaintiff, to support his action, proved that Horatio Bird, who had the management and control of the defendant's manufactory, caused the water to be let off from the pond so rapidly as to overflow several acres of the plaintiff's meadow, and thus to injure his hay and grass. A small ditch had been dug by the defendants through the plaintiff's land, and several witnesses testified that a larger ditch might easily be made, which would, in their opinion, be sufficient to convey all the water which could be let off through the defendants' gate, without injuring the plaintiff's land or grass.

On the part of the defendants, Bird testified, that he ran the

Digitized by Google

Fiske v. Framingham Man. Co.

mill and had control of the pond and water for that purpose, under a written contract with the defendants, dated July 16, 1829, by which he was to run the mill for one year, upon the following conditions:—"The said Bird is to be furnished with good upland cotton, deliverable in Boston, which he is to take and manufacture into shirtings, &c., for which said company agree to pay said Bird 3¼ cents per yard at the end of every month; the cotton is to be used prudently and with care, and the mill to be kept in good running order by and at the expense of said Bird, except the main gearing, which is to be repaired by said company if necessary; the waste to be accounted for by said Bird, or delivered to the company. It is understood, that no rent for the premises is to be charged by said company, and that they are not to be called upon for any expense whatever, unless the main gearing should fail or some injury arise to the dam. The taxes assessed upon the establishment are to be paid by said company. The premises where the factory stands, say about six or seven acres, with the factory houses, blacksmith shop, &c., are all to be used by said Bird, but not the meadows belonging to the factory. The goods are to be delivered in Boston by said Bird." The witness further testified, that he had been previously employed by the defendants under a similar contract, not reduced to writing, and that the defendants had then instructed him to draw off the water from the pond at such times and in such manner as would be most advantageous to the factory; and that he had read the plaintiff's deed before mentioned, but had received no particular instructions after the date of the written contract. He likewise testified, that at the time of the act complained of, (which was within the year mentioned in the written contract,) it was necessary to let off the water as rapidly as he had done; which unavoidably overflowed the ditch. Several witnesses stated as their opinion, that the advantageous running of the mill required that the water should be conveyed as rapidly as it was in the present instance, and that a ditch could not be dug which would transmit the water in sufficient quantities, without overflowing the plaintiff's land.

Among other grounds of defence it was contended, that Bird was the lessee of the defendants, and not their agent, and so

Digitized by Google

Fiske v. Framingham Man. Co.

was alone responsible for the act complained of. But the judge instructed the jury, that if any wrong was proved, the defendants were liable to the plaintiff for the acts of Bird, who was their agent or partner under the contract.

The jury found a verdict for the plaintiff; but if in the opinion of the whole Court the defendants were not liable for the acts of Bird, in consequence of the contract, the plaintiff was to be nonsuited.

Hoar and *Osgood*, for the defendants, insisted that the contract with Bird was a lease; and cited Shep. Touch 267; Bac. Abr. *Leases &c. K*; *Doe* v. *Ashburner*, 5 T. R. 163. Oct. 15th.

T. Fuller for the plaintiff.

Per Curiam. In Bac. Abr. *Leases &c. K*, it is laid down as a rule, "that whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it for such a determinate time, such words, whether they run in the form of a license, covenant, or agreement, are of themselves sufficient, and will in construction of law amount to a lease for years." The question before us then is, whether the contract between the defendants and Bird vested in him the possession of the manufactory and of the parcel of land on which it stands. Some of the provisions have a double aspect, and consistently with them he might be either the agent or the lessee of the defendants; but there are others which admit of only one construction. He was to keep the factory in repair, except that the defendants were to repair the main gearing, if it should be necessary; he was to have the possession, for the purpose of doing what he had stipulated to perform; he had the control of the factory, and could employ what servants he would, and regulate their wages; he might determine how much water should be turned upon the mill; he was entitled to the use of the land about the factory, and to the buildings thereon; and whether these buildings were let to laborers employed by him, or to others, rent would probably be paid to him, either in a diminution of wages or otherwise. These provisions are appropriate in the case of a lease. The words, "that no rent is to be charged by the company," also tend to prove that a letting was contemplated. It was argued that a reservation of Oct. 19th.

Digitized by Google

Fisko v. Framingham Man. Co.

rent was essential to a lease, but this point is immaterial, for taking the whole agreement together, it was manifes that the defendants received rent in the price at which their goods were manufactured. We are therefore of opinion, that Bird was not the servant of the defendants, but their lessee, having the control and possession of the premises mentioned in their agreement, and consequently that the defendants are not liable to the plaintiff in this action.

Verdict set aside and plaintiff nonsuit.

AMMI CUTLER *et al. versus* THOMAS RICE.

Where the defendant in a real action, had been in possession of the demanded premises for six years, but his counsel, in consequence of perturbation of mind occasioned by a dangerous illness occurring in his family during the course of the trial, neglected to make any claim for an allowance for betterments, and the plaintiffs recovered a verdict, the Court, in the exercise of its discretion and to effect the substantial ends of justice, decided to grant a new trial, or to suspend judgment, in order either that the defendant might, with the consent of the plaintiff, remove the betterments from the land, or that, at the election of the defendant, an auditor might be appointed to assess the sum to be allowed the defendant for the improvements.

THIS was a writ of entry to recover a parcel of land in Charlestown. The plaintiffs counted on their own seisin, as trustees under the will of Catharine Lombard, within thirty years, and a disseisin by Sargent and Smith, under whom the defendant claims. Plea, the general issue.

At the trial, before *Wilde* J., there was much conflicting evidence introduced, but the jury found a verdict for the plaintiffs. The defendant moved that the verdict should be set aside and a new trial granted, for the following, among other reasons:

1. Because, during the trial, the mind of the defendant's counsel was thrown into a state of great perturbation, alarm and anxiety, by finding, during the intermission of the court at noon, that one of his children was very ill, and by the apprehension that the disorder was of a fearful and deadly kind, whereby the counsel became unfitted to take such measures in the case as the situation thereof then required.

Digitized by Google

2. Because the defendant had, since the trial, discovered evidence strongly corroborating the testimony introduced by him at the trial.

3. Because the defendant and those under whom he claims, have been in possession of the demanded premises more than six years, have made great improvements thereon, and have erected a dwelling-house, a portion of which stands on the premises; and equity requires that the defendant should be paid for such improvements; but no request was made at the trial, that the jury should estimate the value of the improvements; whereby the defendant is in danger of having the house cut into two pieces and ruined.

The facts set forth in the motion were supported by affidavits. The affidavit of the defendant's counsel stated that his anxiety and alarm occasioned by the illness of his child, prevented his thinking of making a request for the jury to estimate the value of the improvements.

Hoar and *Tufts*, for the defendant, cited *Gray* v. *Bridge*, 11 Pick. 189; *Ex parte Bacon and Lyon*, 6 Cowen, 392; *Ex parte Benson*, 7 Cowen, 363. Oct. 16th.

Buttrick for the plaintiffs.

SHAW C. J. delivered the opinion of the Court. A motion is made in behalf of the defendant, to set aside the verdict and grant a new trial, on the ground of surprise and perturbation on the part of his counsel, arising from sudden and dangerous sickness, occurring in his family, and coming to his knowledge during the trial. Oct. 19th.

The Court are of opinion, that the facts set forth in the motion are well supported by the affidavits, and that they do form a good ground upon which the Court will interpose its general authority, to prevent the injurious consequences proceeding from accident and misfortune. The application upon such a ground is certainly rather a novel one; but we know no limit to the power of the Court so to interpose, where the plain and manifest dictates of justice require it, taking care that it shall never be so exercised, as to encourage or shield negligence or fraudulent contrivance, in the conduct of trials.

But such an application is founded upon the broadest principles of equity; and the Court therefore will look at the state

Digitized by Google

Cutler v. Rice.

of the case, and the effect of setting aside the verdict; and it must appear that it will be substantially beneficial For this reason, the Court will look at the state of the question before the jury, the state of the evidence as it then appeared, and compare it with the evidence which would be produced upon another trial, not to weigh it precisely as it would be weighed by a jury, but to see whether the state of the evidence before the jury would be so essentially changed as to make it proper and necessary to the purposes of justice that another jury should be called to pass upon it. We have made such examination; and without detailing the evidence, we are satisfied, that on the main question, the purposes of justice do not require a new trial, if upon the point hereafter stated justice can be attained without it.

But we are of opinion, that in consequence of the surprise and the causes of it, set forth in the motion and affidavits, the counsel for the defendant was deterred from making a claim for betterments, which was an important one, which he had a right to make, and which it was necessary to the interests of his client to make at the trial. But with the consent of the plaintiffs this object can be effected without a new trial. The defendant is to be at liberty, with the consent of the plaintiffs, to remove his buildings from the premises, at any time within —— days, or, at his election, an assessor will be appointed to assess the value of the estate and the value of the betterments, in order that a judgment may be entered pursuant to the statute; and the judgment on the verdict will be suspended for that purpose.

Digitized by Google

ICHABOD MACOMBER *et al. versus* LEVI PARKER.

By a contract between H & L, lessees of a brick-yard, and E, it was agreed that E should make bricks in the yard, and pay H & L at a certain rate for the clay, and that H & L should purchase wood, sell the bricks, &c.; that the profit or loss should be divided between them; and that H & L should have power to retain the bricks in their possession to the amount of all sums of money which they might from time to time advance to E. Afterwards E drew an order on H & L to pay one D what sums might be due to E from the sales of the bricks after deducting the amount due to H & L for their advances. Afterwards H & L assigned all their property to the plaintiffs, including their interest under the contract above mentioned, and the plaintiffs went into the brick-yard and gave E notice of the assignment, and he assented to it, and agreed to act as agent of the plaintiffs; who on their part agreed to make advances in the same way that H & L were to do under the original contract. The plaintiffs took possession of the brick-yard and of property therein, and by writing gave the charge of it to E, with directions to sell the bricks at retail for cash, and whenever a certain sum should be received, to deposit it in a bank to the plaintiffs' credit. The bricks were subsequently attached at the suit of a creditor of E. In an action of replevin by the plaintiffs against the attaching officer it was *held*, that the right of H & L to retain the bricks as security for their advances to E, was assignable, with the consent of E, and that the plaintiffs had a lien which must prevail against the attachment. It was also *held*, that the order drawn by E was admissible in evidence, as tending to establish the original contract on the part of E, that H & L should retain E's part of the bricks as collateral security.

Although there cannot be a pledge, technically speaking, of a chattel not in existence, there may be an hypothecation, so that as soon as the chattel shall be produced the lien will attach. Thus where it was stipulated by a brick-maker, that the lessees of a brick-yard should retain the bricks to be made, as security for their advances to the brick-maker, it was *held*, that the bricks became pledged as fast as they were manufactured.

Possession of a chattel by the vender or pledger is only evidence of fraud; which may be rebutted by proof that he held possession as the agent or servant of the vendee or pledgee.

REPLEVIN for three kilns of bricks attached by the defendant on several writs against Joseph Evans. Plea, property in Evans. Replication, property in the plaintiffs. Trial before *Putnam* J.

Hunting & Lawrence were lessees of a brick-yard in Cambridge. On March 1, 1829, they made a contract in writing with Joseph Evans, by which Evans agrees "to make from eight to ten hundred thousand good merchantable brick on the brick-yard, to hire the men and board to the best advantage, and to give in his time and services in making the bricks; and Hunting & Lawrence agree to attend to selling of brick, purchasing of wood and all necessary materials for the manufactur

Digitized by Google

Macomber v. Parker.

ing, collecting the bills, &c., to the best advantage; and after the brick are made and the labor and board of the men are paid, and all materials and tools of every kind are paid for, and Evans paying Hunting & Lawrence sixty cents per thousand for each and every thousand brick made or clay sold as rent therefor, the parties agree to share the profit or loss, one half each. Hunting & Lawrence shall have full power to retain Evans's part of the brick or money collected or debts due for brick, &c., in their possession, to the amount of all sums of money now due from Evans, and such other sums of money, goods, &c., as they may from time to time advance him."

The plaintiffs called Hunting as a witness; who testified, that on June 10, 1829, Evans drew an order on Hunting & Lawrence, which they accepted, to "pay over to Thomas Drew, and indorse the same on my note given to James Langley now in the possession of Drew, what sum of money may be due me from the sales of brick made in 1828, after deducting all sums of money due to Hunting & Lawrence for their advances &c.; also what may be due me for making brick this season, after all the men and help are paid and all other sums of money due or may be due to Hunting & Lawrence for their advances to me." Hunting also proved the assignment on July 3, 1829, from Hunting & Lawrence, of all their property, including their interest in the brick-yard and their rights under the contract with Evans, to the plaintiffs, and that on the same day the plaintiffs went to the brick-yard and gave Evans notice of the assignment, and that he assented to it, and agreed to act as agent for the assignees. Evans inquired of the assignees, how he was to be supplied with funds; and they answered, "by the assignees, in the same manner as Hunting & Lawrence were by the contract to have supplied him." The witness carried a written authority from the assignees to Evans, dated July 3, 1829, directing him "to take the charge and care of all the property and effects in and about the brick-yard, and to proceed to sell the same at retail until further orders from us, for cash only, and whenever the sum of 100 dollars is received, to deposit the same in the Branch bank to our credit." Possession was given of all the property in the yard to the assignees. They became dissatisfied with Evans, and appointed the wit

Digitized by Google

ness as their agent. They were desirous of settling with Evans, and the witness, in their behalf, on February 24, 1830, went with Evans into the yard and estimated all the bricks, &c., according to a paper produced at the trial. On February 26th, the witness, on behalf of the assignees, agreed with Evans, that the assignees should take all the bricks at the price set down in the paper above mentioned, for $2030, and should give Evans credit for that sum, and if, upon an exact counting, the bricks should overrun, they were to allow and credit the surplus; if they fell short, Evans was to allow for the deficiency, at the rate agreed upon. One half of the amount of the whole, including boards, tools, &c., was to be credited to Evans; and Evans was to cart the bricks to Boston, for the assignees, for one dollar a thousand. Evans, after this agreement, carted one load of bricks to Bates & Frost, on the Saturday next before the Monday when the defendant attached the bricks as the property of Evans. There was a balance due from Evans to the assignees after giving him credit for his part of the property, but the exact amount was not proved. The assignees advanced about $1000 to enable Evans to carry on the work under the contract. After the agreement on February 26, 1830, Evans was not to have any thing more to do with the yard, but only to cart the bricks; and no more bricks were to be made under the contract. The witness said he intended to effect a sale of all Evans's part of the bricks to the assignees, and completed it on the 26th.

It was testified by Frost, that Evans, while acting as the agent for the assignees, said that he was authorized to sell for cash only, and not upon credit.

These facts were relied on by the plaintiffs, as proving that they held the possession of all the bricks; of Evans's part, as security in virtue of the contract before mentioned, as well as of the part assigned to them by Hunting & Lawrence.

The testimony of Hunting was contradicted by Evans. He denied the sale, and said there was only an intent to take the account of stock, &c.

The jury were instructed, that it was material to settle as a fact, whether the plaintiffs retained the possession of Evans's part of the bricks, for their security under the contract; that

Digitized by Google

Macomber v. Parker

if they intended to do so, and the evidence in the case was satisfactory that they did so hold and retain it under the contract of March 1, 1829, the creditors of Evans had no right to take the property out of their possession, and they had such a property and possession as would enable them to maintain this action; that if the plaintiffs had not retained the possession of Evans's part of the bricks, as above mentioned, it was liable to the attachment made by the defendant for the creditors of Evans, and the verdict should be for the defendant: unless the jury were satisfied that Hunting had stated the truth in regard to the sale on the 26th of February; in which case they should find for the plaintiffs.

The jury were further instructed, that the power to retain possession of Evans's half of the bricks, &c., as security for advances, &c., secured to Hunting & Lawrence by the contract of March 1, 1829, was assignable with the consent of Evans, and that there was evidence of facts and circumstances in the case, from which the jury might infer such assignment and assent, and that the plaintiffs represented Hunting & Lawrence and had their rights.

The jury found a verdict for the plaintiffs, with nominal damages.

Under the instructions, the jury might have found a verdict for the plaintiffs if they believed that the plaintiffs had in fact kept and retained the possession of Evans's part of the bricks under the contract of March 1, 1829; and if the instructions were wrong, or if the evidence was not sufficient to maintain the verdict upon that ground, a new trial was to be granted.

It was not contended by the defendant, that the transactions above stated were fraudulent as against creditors.

The defendant moved for a new trial,

1. Because the judge permitted the order drawn by Evans upon Hunting & Lawrence in favor of Drew, to go to the jury as evidence, notwithstanding the defendant objected thereto.

2. Because the judge instructed the jury, that whether the plaintiffs were entitled to the property in question by virtue of a lien thereon for advances made under the contract of March 1, 1829, was a question of intent only, to be gathered from the facts in the case; and because the judge put it to the jury to

Digitized by Google

say whether, from the facts, the plaintiffs intended to keep possession of Evans's half of the property as security for advances, and if they found that the plaintiffs did so intend, their verdict must be for the plaintiffs, and Evans's creditors could not step in and defeat the intention by their attachment.

3. Because the jury were instructed, that the power to retain possession of Evans's half of the property as security for advances, &c., secured to Hunting & Lawrence by the contract of March 1, 1829, was assignable with the consent of Evans, and that there was evidence in the case from which the jury might infer such assignment and assent, and that the plaintiffs represented Hunting & Lawrence and had their rights.

Buttrick and *R. S. Fay* in support of the motion. The order in favor of Drew was inadmissible in evidence. It was drawn upon a contingent fund, which never came into the hands of Hunting & Lawrence, so that they were not liable on their acceptance, and when they made their assignment, the plaintiffs did not become bound by the acceptance. The order had no tendency to prove that Hunting & Lawrence had taken possession of the bricks to acquire a lien, or that the bricks were in existence, and it had no bearing on the case. *Ex parte Heywood*, 2 Rose, 355; *Hassall* v. *Smithers*, 12 Ves. 119; *De Wolf* v. *Chapin*, 4 Pick. 59; *Charlton* v. *Lathe*, 7 Pick. 44.

Oct. 15th

The plaintiffs had no lien on the bricks by virtue of the contract of March 1, 1829, and the assignment from Hunting & Lawrence. Hunting & Lawrence were partners with Evans, and during the continuance of the copartnership there could be no such lien as between Hunting & Lawrence and Evans; and if Hunting & Lawrence had no lien, their assignees can have none. But if the plaintiffs and Evans became tenants in common, a lien could not subsist as between them without possession. *Sweet* v. *Pym*, 1 East, 4; *Homes* v. *Crane*, 2 Pick. 607; *Lickbarrow* v. *Mason*, 6 East, 27. The plaintiffs went upon the brick-yard, merely to take possession of Hunting & Lawrence's share of the property, and not to obtain a lien. It may be urged that the possession was in the plaintiffs, inasmuch as Hunting & Lawrence were lessees of the yard; but Evans was sub-lessee, paying a rent of sixty cents per thousand bricks, and was in possession

Digitized by Google

Macomber v. Parker.

Burt v. *Moore*, 5 T. R. 329; Co. Lit. 4, *Rex* v. *Tolpuddle*, 4 T. R. 671; *Wilson* v. *Mackreth*, 3 Burr. 1826; *Crosby* v. *Wadsworth*, 6 East, 602; Shep. Touch. 267; Bac. Abr. *Lease*, *K*; *Butterfield* v. *Baker*, 5 Pick. 522; *Wait*, *Appellant*, 7 Pick. 100. He had unlimited control of the bricks and was selling them and receiving the proceeds, at the time when the attachment was made. It is said he was in possession as agent, but he could not be in possession as agent, to preserve the lien, any more than a debtor whose property is attached, can be in possession to preserve the attachment. *Train* v. *Wellington*, 12 Mass. R. 497; *Bridge* v. *Wyman*, 14 Mass. R. 195; *Carrington* v. *Smith*, 8 Pick. 419; *Ex parte Coming*, 9 Ves. 115; *Wilson* v. *Balfour*, 2 Campb. 579; *Ex parte Whitbread*, 1 Rose, 299. Besides, the bricks were not made at the time, and a lien cannot attach until the property is in existence.

But if the plaintiffs took possession with a view to a lien, they have waived the lien, as they claim to hold by a better right, namely, by a sale. Woolrych's Commerc. Law, 231; *Boardman* v. *Sill*, 1 Campb. 410, note.

The instruction that the right to retain possession, secured to Hunting & Lawrence, was assignable, was incorrect, a lien being a personal privilege. *Daubigny* v. *Duval*, 5 T. R. 606; *Holly* v. *Huggeford*, 8 Pick. 73; *Bonsey* v. *Amee*, ibid. 236.

D. A. Simmons and *Gay*, for the plaintiffs.

April term 1834.

PUTNAM J. delivered the opinion of the Court. It has been settled at the former hearing of the law in this case,* that Evans had a joint interest in the bricks, with Hunting & Lawrence, under the contract of March 1, 1829.

Hunting & Lawrence had funds and were to make advances to Evans for the wood and all materials, and were to be allowed therefor on settlement, together with sixty cents per thousand for the clay; the brick-yard was in their possession as lessees, Evans was to give in his time and services, in the making the bricks; and the profit and loss were to be divided between them, after the account should be settled upon these principles.

It was expressly agreed between them, that Hunting &

* See *Macomber et al.* v. *Parker*, 13 Pick. 175.

Digitized by Google

Lawrence should *retain* the said Evans's part of the bricks, or money collected or debts due for bricks, in their possession, to the amount of all sums of money, goods, &c., as they might from time to time advance to him.

It appears that on the 10th of June 1829, Evans drew his order on Hunting & Lawrence to pay Thomas Drew "what sum of money might be due to Evans from the sales of the bricks in 1828, after deducting all sums of money due to them for their advances, &c. *Also*, what might be due for the making of the bricks this season, after all the men and help are paid and all other sums of money due or which may be due to Hunting & Lawrence for their advances to me." The money which might be so received by Drew was to be endorsed on Evans's note then held by Drew.

So this order was for value received. And Hunting & Lawrence, on June 10, 1829, accepted it in writing, to pay what might be due as above stated.

The legal operation of this order was to assign and transfer to Drew, what should remain due to Evans upon a final settlement of this concern.

It has been objected that this order ought not to have been admitted, but we all think it was competent evidence, tending to establish the original contract on the part of Evans, as it recognises the right of Hunting & Lawrence to *retain* Evans's part of the bricks as collateral security; which is one of the great points in the cause.

Evans went on with the work, until Hunting & Lawrence failed, and on July 3, 1829, assigned their interest to the plaintiffs. In virtue of that assignment the plaintiffs (as they contend) stood in all respects in the same right and condition that Hunting & Lawrence did. On the same day, the plaintiffs went into the brick-yard and gave notice to Evans of the assignment which Hunting & Lawrence had made to them. *Evans assented to it and agreed to act as the agent of the plaintiffs*; and they, on their part, agreed to make advances, in the same way and manner as Hunting & Lawrence were to do under the original contract.

It is contended by the counsel for the defendant, that the lien which Hunting & Lawrence had (if they had any at all)

Digitized by Google

Macomber v. Parker.

was a personal privilege, and could not be transferred or assigned. But it is very clear that the parties to the original contract might modify or alter it at their pleasure. And we can perceive no reason why, with the consent of Evans, the plaintiffs might not become the assignees of Hunting & Lawrence of their right to retain, as well as of all other rights which had accrued or might arise under the contract. It was a substitution of the plaintiffs in the place of Hunting & Lawrence, with Evans's consent. And the defendant who claims under Evans, cannot make any valid objection to it. *Urquhart* v. *M'Iver*, 4 Johns. R. 103.

It was proved that the plaintiffs took possession of all the property in the yard, and by writing, on the same day, they gave the charge of all the property in and about the yard to Evans, with special directions to sell the same at *retail for cash and when a sum amounting to* 100 *dollars was received, he was to deposit it in the Branch bank to the plaintiffs' credit.* It was proved that Evans then proceeded with the work, he and the plaintiffs being tenants in common. The plaintiffs were to retain the possession of the bricks, &c., just as Hunting & Lawrence were to do; and the profits and losses were to be divided according to the terms of the original contract.

It is not easy to perceive, (fraud being out of the question,) that there is any thing unjust, illegal or inexpedient in this arrangement.

It was not suggested at the trial, that there was any moral fraud, or any intent to do wrong. But the transaction is called in question by a creditor of Evans, who has interfered and attached the property as belonging to Evans, in common with the plaintiffs, on the ground that the law will not uphold this transaction; and the question is, whether their attachment should prevail, or whether the plaintiffs should hold the property until their advances should be paid.

It appeared at the trial, that after the settlement of the concern, there would not be enough in the hands of the plaintiffs to pay what was due to them from Evans; so that nothing could become due to Drew, who stood in the place of Evans, in regard to any balance remaining after the plaintiffs had deducted the advancements &c.

Digitized by Google

Let us consider the nature of the original contract or agreement, and whether it is such as the law will sustain.

As before observed, it was a *bonâ fide* transaction, which the law delights to uphold, if it can, without violating any settled rules it has prescribed.

It was an agreement for the pledging of the bricks as they should be made. It is true that where the property is to be thereafter acquired, it is not strictly and technically a pledge; it is rather an hypothecation; but when the title is acquired *in futuro*, the right of the pledgee attaches immediately upon it. Story's Bailments, *p.* 200, § 294; Domat, Civ. Law, *bk.* 3, *tit.* 1, § 1, *no.* 5; Ayliff, Civ. Law, *bk.* 4, *tit.* 18, *page* 530. "Not only goods in present possession, but even goods in reversion, are comprehended under a general pawn or hypotheque, as corn in the ground, a ship to be built with the timber pledged, if there be a clause inserted to comprehend it." "An hypotheque may be an assurance of a thing to be delivered hereafter," ibid. *page* 525, 542.

In Montag. on Liens, 36, note (*c*), it is said, that "it is usual to speak of *lien by contract*, though that is more in the nature of *an agreement for a pledge*. Taken either way, however, the question always is, whether there be a right to detain the goods till a given demand shall be satisfied;" citing *Gladstone* v. *Birley*, 2 Meriv. 404.

This citation presents the point under consideration with great precision. Have the plaintiffs a right under the original contract, assignment and subsequent proceedings, to retain the bricks until their claims arising from the making of them, &c., shall be paid? Or shall the attaching creditors avail themselves of the plaintiffs' funds to pay Evans's debts?

It is contended that Evans was ostensibly the owner, and that his creditors would be induced to credit him on that account, and so would be defrauded. But the same objection lies in every case where one man has the actual possession, and another has the constructive possession, together with the legal right of property, in goods or chattels. It is evidence tending to prove that the transaction is fraudulent against creditors, but not conclusive, or fraudulent *per se*.

Digitized by Google

Macomber v. Parker.

Now we hold it to be clear, that the plaintiffs had a right to retain Evans's part of the bricks under this contract It was expressly agreed by Evans that they should have such a right. Without such a right it is not to be supposed that the plaintiffs would have made the great advances which were necessary to enable Evans to make the bricks. Every brick as it was formed may well be considered as delivered to the plaintiffs in part execution of the contract. The whole were put into kilns and burnt in the plaintiff's yard; for as assignees of the lessees, they legally held the yard in their possession during the term. It was their land, *pro hac vice*, as much as it would have been if it had been held by them in fee simple. And there the property remained when the defendant attached it.

But it is contended, that if the plaintiffs had a right to retain, they have not in fact retained, but have parted with their right by permitting Evans to have the charge of the property.

The jury have found that the plaintiffs did retain the possession. But if upon the facts reported upon that point, the evidence is not sufficient to support it, the verdict must be set aside. We think that the evidence is sufficient, and that the plaintiffs have held the possession of the property which was pledged.

The substantial part of the evidence arises from the contract itself. Certainly nothing has been done in relation to the manufacturing of the bricks, which was not within the express provisions it contained. Evans "was to hire the men and board, and was to be allowed therefor; he, to the best advantage, was to perform the manufacturing of the bricks; and he was to give in his time and services in making the bricks." He must necessarily have the charge of the whole property in the yard, while he was in the process of making the bricks, and putting them into kilns and burning them, &c.

But it is contended that the plaintiffs have lost their pledge, by giving an authority to Evans to act as their special agent in the sale of parcels of the bricks at retail. Let us consider the terms of the authority; and the legal operation of it upon the contract.

The first clause authorizes Evans to take the charge and

Digitized by Google

care of all the property and effects in and about the brick-yard, it having been assigned to the plaintiffs. Evans had by necessary implication the same authority under the contract, as before remarked. But by the terms of the contract, Hunting & Lawrence, and after their assignment, the plaintiffs, were to attend to "the selling of the bricks, purchasing wood," &c. And by the second clause in their written authority to Evans, *he* was empowered to sell the bricks at retail *until further orders* from the plaintiffs, for cash only, and whenever 100 dollars should be received, he was to deposit the same in the Branch bank to the plaintiffs' credit."

There is now no question before us, how he executed that agency; whether he deposited the money when he had received to the amount of 100 dollars or not. If he abused the authority, and spent the money instead of placing it to the plaintiffs' account in the bank, the plaintiffs must unquestionably sustain the loss. But it is difficult to see how the plaintiffs can be otherwise affected by it.

It was a special limited authority, which bound the plaintiffs so far as it was executed, but which could not affect their right in and to the great bulk of the property, which remained untouched by the agent. A release of part of an undivided portion of things pawned or pledged, will operate only as an extinguishment *pro tanto*. Story on Bailm. *p.* 244, § 364. It is a question of intent. ibid. § 365.

Besides, by the express terms of the authority, this special agency was to continue only until *further orders;* and the case finds that the plaintiffs were afterwards dissatisfied. They discharged Evans, and appointed Hunting to be their agent, before the attachment was made. So that from the time Evans was discharged, until the attachment, the plaintiffs had the actual possession, care and charge of the brick-yard, bricks and property, by themselves or their new agent, Hunting.

To say that this limited authority to sell bricks by retail, in small sums, on account of the plaintiffs, was a waiver of their possession of the residue that remained in the kilns in their yard, would be clearly against the intent and meaning of the parties, unreasonable, and unwarranted by the evidence.

But no possession, charge, care or authority, was ever given

Digitized by Google

Macomber v. Parker.

to Evans in his character of *pledger* of the bricks. The general authority which he had under the contract, to take the charge of the yard while the process of manufacturing was going on, was an agency *quoad hoc* created by necessary implication. If it were not so, the agreement to retain was a *felo de se*. And the special authority given by the plaintiffs to Evans, was to clothe him with the character of agent to a limited extent only, and no remission to him, in his character of pledger, of the plaintiffs' right to retain the bricks according to the agreement. He was their special attorney, with a limited power. Com. Dig. *Attorney*, *C* 4. "Many persons have ability to act as an attorney for others; as a monk, infant or alien, may make livery as an attorney," &c. A feme covert may make livery to her husband, or *vice versa*. So she may act for him in any department or business. *Emerson* v. *Blonden*, 1 Esp. Rep. 142. So her promise for her husband will take the case out of the statute of limitations, she being authorized to act in that behalf for him. Per *Buller* J. in *Palethor* v. *Furnish*, 2 Esp. Rep. 511, note. So a man may be an attorney to another though he has an interest; as he in remainder shall be an attorney to give livery to the lessee for life.

And in these cases, the act done by the attorney is treated in the law just as if it had been done by the principal who gave the authority. Thus in *Moor* 11, *pl.* 41, "the lessor made a letter of attorney to his lessee for years, to make livery of the land which was under lease, to a stranger, who made it accordingly. It was nevertheless agreed, that the act and agreement of the lessee was no surrender of his term, for he did not make the livery in his own right, but as the servant or agent [minister] of the lessor, and by his authority. And when the lessor made the feoffment, he did not give any thing but what might rightfully pass, viz. his *reversion*. And the livery of the *lessee* gave nothing to the feoffee, but is only the mode of passing that which the *lessor* might lawfully pass. As if the tenant make a feoffment of his tenancy, and the lord as attorney make livery, it does not extinguish his seigniory, for he did nothing unless by the authority given." The reason is clear. The lessee was not acting in his character as lessee,

Digitized by Google

but as an agent and attorney of the lessor. It was legally the act of the lessor. Co. Lit. 112 *b*. Paley on Princip. and Agent, *pt.* 1, § 1, "In all cases where a man has power as owner, or in his own right, to do any thing, he may do it by another; as to sell his lands, goods," &c.

And the principal shall not be prejudiced beyond the authority given, any more than the attorney shall be prejudiced by the execution of the authority or agency.

Suppose that A keeps a livery stable, and sells a horse or pledges a horse to B, and delivers the possession to B accordingly; may not B keep the horse at the same stable afterwards, without losing his possession? From and after the delivery, A acts in character of livery-stable-keeper merely, not in character of owner.

Suppose that A, having so pledged and given possession of the horse, should go and live with B as a coachman; and B should send him with the horse to be shod on his account by the blacksmith; could it be maintained that B had waived or lost the possession of his pledge? Clearly not. The possession would continue to be kept by the servant, for the account of the master.

If the vender or the pledger should have the actual possession of the property after it were pledged or sold, it would be only *primâ facie*, but not conclusive evidence, of fraud. The matter might be explained and proved to be for the vendee or pledgee. It is a most familiar principle, that one man may have the actual possession or custody, while another has the legal title and the constructive possession. *Brooks* v. *Powers*, 15 Mass. R. 244; *Badlam* v. *Tucker*, 1 Pick. 389.

And the same principle is recognised in *Latimer* v. *Batson*, 4 Barn. & Cressw. 652. In this case one R purchased certain furniture belonging to the Duke of M, seized by the sheriff on an execution against the duke. R sold the same to the plaintiff, who put his servant into possession, but the duke was permitted to continue to use the goods after the sale, just as he had done before. But the true state of the transaction was generally well known. Another creditor, however, levied his execution on the same goods as belonging to the duke. *Abbott* C. J. said, "Possession is much to be re-

Digitized by Google

Macomber v. Parker.

garded, but that is with a view to ascertain the good or bad faith of the transaction." It was so left to the jury. He said, the judge would not have been justified in telling the jury, that the sale was void in consequence of the duke's having enjoyed the use of the goods by the sufferance of the purchasers.

The lien would be destroyed if the party gives up his right to the possession of the goods. Whether he did relinquish it or retain it, was submitted to the jury as a fact, and they have found that he retained it.

In the case at bar, we think it to be perfectly clear, that the plaintiffs had the right to retain in virtue of the original contract; that they took the actual possession; that the right to retain was never waived or given up; that the limited agency exercised upon some of the goods for the benefit of the plaintiffs, did not affect the great part of them that were attached; and that no right to those goods ever passed from the plaintiffs to the pledger as such, he having merely a limited agency or power only to act for the plaintiffs in this respect, and which was revoked before the attachment.

In our opinion, the evidence upon this point is clearly sufficient to support the verdict, and judgment must be rendered for the plaintiffs accordingly.

James A. Worcester *et ux. versus* George R. Marchant.

Under the *St.* 1784, *c.* 72, § 11, which provides that every master of a ship that shall carry or transport out of this government an infant, &c., without the consent of his parent, &c., shall be liable for the damages sustained by the parent, &c., in a special action of the case, no action can be maintained by the infant's mother and step-father, for they have no legal right to the minor's society or services.

Action on the case brought by James A. Worcester and his wife Prudence Worcester. The declaration alleged, that the defendant, on the 29th of December, 1827, was the master of the ship Loan, then at Edgarton; that he, on that day, being bound on a whaling voyage to the South Sea, took and received on board of his ship one William Frost, a minor of

Digitized by Google

the age of eighteen years, a son of Prudence Worcester by a former husband deceased, and immediately set sail, and carried and transported the minor out of this commonwealth to Oahu, in the Sandwich Islands, without the consent of Prudence or of her husband, or of any master or guardian of the minor, contrary to *St.* 1784, *c.* 72, § 11; by means whereof Prudence has wholly lost the benefit and comfort of the society, work, labor, earnings and services of the minor, from December 29, 1827, to April 22, 1831, the date of the writ, and an action has accrued to her in her right and to James A. Worcester to recover her damages, by force of the statute, against the defendant.

The statute of 1784, *c.* 72, § 11, provides, "that every master or commander of any outward-bound ship or vessel, that shall hereafter carry or transport out of this government any person under the age of twenty-one years, or any apprentice, or any indented servant, to any parts beyond sea, without the consent of his parents, master or guardian, shall forfeit and pay the sum of fifty pounds; one moiety to the use of this government, and the other moiety to him or them that shall sue for the same; and be further liable for the damages sustained by the parent, master or guardian, in a special action of the case."

After a verdict for the plaintiffs, the defendant moved in arrest of judgment, 1. because no legal cause of action was set forth in the declaration; 2. because the claim for damages in the declaration, includes a claim for damage to Prudence Worcester on account of the loss of the work, labor, earnings and services of the minor.

Dunlap, for the defendant, objected to the action on several grounds; among others, that these plaintiffs had no legal right to the services or society of the minor, but that he was entitled to his own earnings. 2 Kent's Com. 163; *Freto* v. *Brown*, 4 Mass. R. 675; *Commonwealth* v. *Hamilton*, 6 Mass. R. 273.

Oct. 10th.

S. D. Parker for the plaintiffs. This action given by the statute is no assumpsit to recover the earnings of the infant carried away, but an action *ex delicto* for the damages sustained by the parent in consequence of that act. The legisla-

Digitized by Google

Worcester v. Marchant

ture regarded not merely pecuniary damage, but likewise the injury to the feelings of a parent. The mother derives comfort from the society of her child, notwithstanding her second marriage; and if he had returned disabled, and incapable of supporting himself, she would still remain liable for his maintenance, if she were of sufficient ability. *St.* 1793, *c.* 59, § 3.

April term 1834.

PUTNAM J. delivered the opinion of the Court. The main question is, whether there is a legal cause of action set forth in the declaration.

It has been suggested that the plaintiff, James A. Worcester, the husband, has deceased since the commencement of the action; but we have considered the case as it existed when it was commenced.

It proceeds upon the ground, that the father-in-law and the mother have a right to the services of her minor son during his minority; but we think that the case of *Freto* v. *Brown*, 4 Mass. R. 675, is decisive against the right claimed. In that case it was determined, that a minor whose father is dead and whose mother afterwards married, is entitled to his own earnings while in the service of a third person.

It is clear that the father-in-law is under no legal obligation to support his son-in-law. The son-in-law has no home in the house of his father-in-law. He may turn the son-in-law out of doors when he pleases. The only claim which the father-in-law has, is that which a stranger has, for necessaries furnished to the minor.

In the *Commonwealth* v. *Hamilton*, 6 Mass. R. 275, it was held that the mother, by her second marriage, ceased to have the power of controlling her own actions, and the power of supporting and educating her child.

In *Tubb et al.* v. *Harrison*, 4 T. R. 118, it was decided that the husband is not bound to maintain his wife's child by a former husband. The statute of 43 *Eliz. c.* 2, § 7, extends to natural relations. Our statute of 1793, *c.* 59, § 3, must have the same construction. Mr. Christian, in 1 Bl. Comm. 449, note, thinks that if the wife had a separate property, an order might be made upon her alone. But in this case there are no facts stated, which call for a decision upon that point.

And if the action were by the mother alone, it does not ap

Digitized by Google

pear that she was of sufficient ability to be liable, under the statute last cited, or that the son was a pauper in need of her assistance and relief.

Besides, under the statute, children or grandchildren of sufficient ability are liable to maintain their parents or grandparents who are paupers. And if the right to the services should follow the liability under the pauper act, the children would have a right to the services of the parents, as well as the parents to the services of the children. The statute relating to paupers, therefore, may be laid out of this case.

This young man, for aught that appears, voluntarily entered into this service, being of a proper age, and the employment was such as was apparently useful to him and beneficial to his country. If he behaved himself well and returned, he, and not his father-in-law and mother, would clearly be entitled to his share of the proceeds of the whaling voyage.

After the second marriage, the plaintiffs could not claim damages for the loss of the society, any more than for the earnings of the minor; for the rights and duties must be reciprocal. If he had no claim upon them for support, they could have no claim upon him for his society or labor.

It is the opinion of the whole Court, that the judgment must be arrested.

Digitized by Google

FRANCIS TUTTLE *versus* JAMES BROWN.

The demandant having purchased at a sale on execution, the right in equity of redeeming a parcel of land, afterwards took an assignment of the mortgage, (which mortgage and assignment were duly recorded,) and then, before the mortgager's right to redeem from the sale on execution had expired, brought a writ of entry on the mortgage to recover possession of the land. It was *held*, that without an actual entry by the demandant or the mortgagee, the demandant had a seisin which would support the action.

Held also, that the mortgage was not merged in consequence of the demandant's having purchased the equity of redemption when sold on execution.

Held also, that under the general issue, the tenant could not give in evidence the officer's deed to the demandant, of the equity of redemption.

THIS was a writ of entry, commenced November 29, 1831, in which the demandant alleged a seisin of the demanded premises in fee and in mortgage within twenty years, and a disseisin by the tenant. Plea, the general issue.

The demandant read in evidence a deed of mortgage from Benjamin Wild to Theodore Reed, dated March 24, 1826, and recorded on the same day; an assignment of the mortgage, by Reed to Rufus Litchfield, dated November 25, 1828, and recorded on July 17, 1830; and a second assignment of the same, by Litchfield to the demandant, dated August 30, 1831, and recorded on October 17th, 1831. There was no evidence of any actual entry upon the premises by the mortgagee or either of the assignees of the mortgage.

The tenant gave in evidence a deed made by Moses Prichard, a deputy sheriff, to the demandant, dated September 12, 1831, of all the right in equity which J. W. Tuttle and Thomas Brown, or either of them, had, to redeem the mortgaged premises; which deed recited a sale thereof to the demandant on August 22, 1831, by virtue of an execution.

The demandant contended that this evidence was not admissible on the part of the tenant, under the general issue. The tenant contended that it was admissible, and that the assignment of the mortgage to the demandant after he had purchased the equity of redemption, operated as a discharge of the mortgage, or an extinguishment or merger of it, so that the demandant could not maintain this action upon it, because he could not be at the same time the mortgager and mortgagee of the premises.

Digitized by Google

The tenant also insisted, that the assignments did not give the demandant such an actual seisin within twenty years as his writ alleged.

The tenant was the assignee of the right in equity to redeem the premises in one year from the sale on execution.

Upon this state of the evidence the cause was taken from the jury, with the assent of the parties that judgment should be entered upon nonsuit or default, according to the opinion of the whole Court.

Oct. 16th

Stearns, for the tenant. To the point that the mortgage was merged or extinguished, he cited 2 Bl. Comm. 177; 1 Cruise's Dig. 20, 503; Co. Lit. 388 *b*; 4 Dane's Abr. 292, *art.* 28; 15 Viner's Abr. *Merger*, *B*, *D*, *I*; Bac. Abr. *Leases*, *R*; 3 Preston on Convey. 43, 45, 327, 328; 2 Powell, (Rand's edit.) 488 *a*, note; Woodfall's Landl. and Ten. (1st Amer. edit.) 132, 133; *Barker* v. *Parker*, 4 Pick. 506; *Wade* v. *Howard*, 6 Pick. 494; *Selby* v. *Alston*, 3 Ves. 339; *Philips* v. *Brydges*, ibid. 126; 2 Fonbl. Eq. 162. As to the admissibility of the evidence offered by the tenant, under the general issue, he cited Adams on Ejectment, (Amer. edit.) 286.

Hoar and *Keyes*, *contrà*, cited on this last point, *Green* v. *Kemp*, 13 Mass. R. 515; *Wolcott* v. *Knight*, 6 Mass. R. 418; *Gould* v. *Newman*, ibid. 240; Jackson on Real Actions, 154, 157, 158; Stearns on Real Actions, 233. As to merger they cited *Dexter* v. *Harris*, 2 Mason, 531; *Freeman* v. *Paul*, 3 Greenl. 260; *Gibson* v. *Crehore*, 3 Pick. 482; *James* v. *Morey*, 2 Cowen, 246, 284; *Sargent* v. *M'Farland*, 8 Pick. 500; *Starr* v. *Ellis*, 6 Johns. Ch. R. 393.

April term 1834.

PUTNAM J. delivered the opinion of the Court. The demandant counts upon his seisin in fee and in mortgage within twenty years, and upon a disseisin by the tenant. The action is technically, *entry in the quibus*.

The tenant has pleaded the general issue, viz. that he did not disseise the demandant.

To prove his seisin in fee and in mortgage, the demandant read the deed of mortgage from Benjamin Weld to Theodore Reed, dated March 24, 1826, a deed of assignment by Reed

Digitized by Google

Tuttle v. Brown.

to Rufus Litchfield, dated November 25, 1828, and a deed of assignment by Litchfield to the demandant, dated August 30, 1831. These deeds were read in evidence without any objection. But no evidence was offered of any actual entry by the mortgagee, or by the subsequent assignees; and the tenant contends that evidence of such an actual entry is necessary, to enable the demandant to recover.

It is not suggested that the mortgager was not seised when he made his mortgage deed, which was duly executed and recorded. By operation of law, the mortgagee became seised to all intents and purposes, as if the mortgager had given livery and seisin in fact. And so by the operation of the law the assignees, in virtue of the deeds of assignment, became seised of the estate and rights of the mortgagee, there being no evidence of any disseisin made by any person, which would prevent the legal operation of the deeds of assignment.

We think it clear that the evidence so produced by the demandant is sufficient in law to maintain his seisin in fee and in mortgage, according to his allegation in his writ. For if the mortgager should remain in possession it would not be a disseisin of the mortgagee. He might convey the estate to a third person, who would thereupon become seised of the legal estate in the lands, subject to the condition in the mortgage. *Gould* v. *Newman*, 6 Mass. R. 241.

The action was commenced in November next after the assignment of the mortgage to the demandant.

It is for the tenant then to disprove the demandant's seisin, as alleged, or to show that his entry upon the demandant was by judgment of law or other lawful title. The latter alternative he does not attempt to prove.

The tenant has no evidence of right or title; but to disprove the seisin of the demandant, he offers a deed of assignment made by one Moses Prichard, a deputy sheriff, to the demandant, dated September 12, 1831, of the right in equity of redemption which one Thomas Brown had in the premises, and contends, that as the demandant acquired the rights of the mortgagee, after he had acquired the right in equity to redeem, he became seised of the whole estate in fee, and the mortgage was extinguished.

Digitized by Google

And two questions are made; 1. Whether such deed is admissible under the general issue; and 2. If it is, whether it disproves the alleged seisin in fee and in mortgage.

As to the first question, can this evidence be received under the general issue. The deed purports to have been made by a deputy sheriff under and in virtue of the statute relating to the sale of the right in equity of debtors to redeem mortgaged estates.

It is clear to us that this should have been specially pleaded. For it may be that the requisitions of the law were not complied with by the officer in making the sale; and if so, the demandant should have had an opportunity of replying that nothing passed by the deed, by reason of such omission or act of the deputy sheriff as would have avoided it, or that it was never delivered, &c. The rejoinder might have been a denial of the facts set forth in the replication, or the tenant might have demurred to the replication; and in the latter case the court, and not the jury, would have decided the matter. It does not *necessarily* follow, that because such a deed is produced, the demandant became seised of the right in equity to redeem the estate.

But if it were admissible under the general issue, and there were no legal defects in the proceeding, we are all clearly of opinion that there was no merger, so as to give the demandant the absolute estate in fee simple. For the debtor had by law a right to redeem the right in equity so sold and conveyed by the deputy sheriff, within one year from the sale, so that when the demandant commenced his action *it could not be legally said, that he had the whole estate.* He still continued to be seised only in fee and in mortgage, and the evidence, if admitted, had no tendency to disprove that allegation, inasmuch as the debtor at that time had the right to defeat the title which could pass to the demandant under the sheriff's sale.

The consequence is, that the demandant is entitled to his judgment, which must follow his declaration, as upon a mortgage.

Digitized by Google

COMMONWEALTH *versus* TARRANT P. MERRIAM

Where upon the trial of an indictment for adultery, one act of adultery committed by the defendant with the woman named in the indictment, was proved by the testimony of a witness whose credibility the defendant attempted to impeach, it was *held* that other instances of improper familiarity between the defendant and the same woman not long before the act of adultery proved as above mentioned, might be given in evidence to corroborate the testimony of the witness.

INDICTMENT for adultery committed by the defendant with Cynthia Blood, in January 1830.

At the trial in the Common Pleas, before *Strong* J., the marriage of the defendant with Betsy Merriam, who was living, was first proved. Jonathan Snow, a witness on the part of the commonwealth, then testified, that in February 1830, between nine and ten o'clock in the evening, he was passing the defendant's house, and seeing a light, he stepped up to the window and looked in; that he saw the defendant in bed; that Cynthia Blood came in, undressed herself and got into the same bed; and that soon after the defendant blew out the light.

Snow and two other witnesses testified respectively to three instances of improper familiarity between the defendant and Cynthia Blood, one of which was about a fortnight and the others within a year before the adultery proved as above mentioned.

Many witnesses were called to impeach Snow's general character for veracity, and many to support it in that particular.

The evidence of improper familiarities was objected to, as not tending to prove the act of adultery to have been committed on the night when Snow testified that he saw Cynthia Blood get into the bed where the defendant lay. But the judge permitted the evidence to go to the jury, upon the ground that instances of improper intimacy or familiarity between Cynthia Blood and the defendant, happening a short time previously to the time when the crime was charged to have been committed, were competent evidence. To this opinion the defendant filed exceptions.

The jury found a verdict for the commonwealth.

Oct. 18*th.* *H. H. Fuller*, in support of the exceptions. The rule, both

Digitized by Google

in civil and in criminal cases, is, that the evidence must be confined to the fact in issue. The testimony of Snow, that he saw Cynthia Blood get into bed with the defendant, was complete proof of the charge in the indictment; and the evidence of other instances of improper conduct had no tendency to prove that particular act of adultery, and probably was introduced merely for the purpose of sustaining Snow's credibility. The government could not put in issue the defendant's general character; much less could they prove that on particular occasions he acted indecently. There are some exceptions to the general rule, as where collateral facts are required to prove the *quo animo* or the *scienter*, but here the testimony of Snow left no doubt as to the intention of the defendant. 1 Phillipps on Evid. (6th edit.) 158, 168, cites *Rex* v. *Cole*; 1 Chit. Cr. Law, 564; 1 Stark. Evid. 23, 30, 31, 32, 39; 2 Stark. Evid. 366, 367, 382; 9 Petersdorff, 147, 148, 149, note; 2 Russell on Crimes, 1513, 1514, 1515; *Finnerty* v. *Tipper*, 2 Campb. 72; *Stuart* v. *Lovell*, 2 Stark. R. 93.

Austin, attorney-general, for the commonwealth. The particular day on which the adultery is alleged in the indictment to have been committed, is immaterial; and if it were proved that a married man and an unmarried woman lived together as man and wife, although there were no ocular evidence of any particular act of adultery, the proof would be sufficient to sustain an indictment for the offence. The only objection would be, that it showed the offence to have been committed several times instead of once; but that will not prevent a conviction for one offence. Under the circumstances proved in the present case, it was competent to the jury to infer, that Cynthia Blood was the defendant's paramour. The fact that a person has committed larceny or perjury at one time, does not prove that he has done so at another; but intimacy between the sexes is of a different nature.

Fuller, in reply, to show that although the time alleged was not material, yet that the government could prove but one offence, cited 1 Chit. Cr. Law, 557; East's P. C. 519.

PUTNAM J. delivered the opinion of the Court. Evidence should be excluded which tends only to the proof of collateral facts. It should be admitted if it has a natural tendency to

April term 1834.

Digitized by Google

Common-wealth v. Merriam.

establish the fact in controversy. If the evidence is irrelevant, it should be rejected for two reasons; 1. It would have a tendency to mislead the jury from the true subject of the inquiry; and 2. No man is to be expected to go to trial prepared to prove things which are unconnected with the issue.

The issue upon this indictment was, whether or not the defendant had committed adultery with Cynthia Blood. The government offer the testimony of Jonathan Snow, to prove that this offence was committed with her in February 1830. The particular day set forth in the indictment was immaterial; the offence might have been proved on that, or on any other day prior to the caption of the indictment.

The evidence, from the nature of the offence, must generally be circumstantial. If the facts stated by Snow, are true, there could be no reasonable doubt of the guilt of the defendant.

But Snow's general character for truth was impeached by the defendant, and it was supported by the government. And the court admitted evidence of other instances of improper intimacy between Cynthia Blood and the defendant, happening a short time before February 1830, as having a tendency to corroborate the testimony of Snow, in regard to the intercourse which he testified had taken place between those persons. To the admission of such evidence the defendant objected, and the question is whether it was competent.

It was argued that the defendant was not to be put upon his trial for every act of his life, but for a particular offence. Be it so; if the evidence which was received, has a natural tendency to corroborate other direct evidence in the case, it would seem to be clearly admissible.

In 9 Petersdorff, 149, note, there are some cases which illustrate this subject. Thus, in prosecutions for uttering counterfeit money, evidence that the defendant had previously uttered other counterfeits, or that he had others in his possession, is admissible. Evidence of this kind has uniformly been received as tending to show the *scienter*. So where several were indicted for a conspiracy to carry on the business of common cheats, it may be proved that *similar* false represen

Digitized by Google

tations had been made by the prisoner to others who were in business, but who were not named on the record.

So upon an issue out of chancery to try a question of illegitimacy, after probable evidence of non-access, evidence may be given that the mother was of bad character. The husband and wife had lived apart, she in London, he in Staffordshire, and the plaintiff was born three years after the separation. Chief Justice *Raymond* allowed evidence that the mother was of bad fame, to rebut the presumption of legitimacy, and the jury found the plaintiff to be illegitimate. *Pendrell* v. *Pendrell*, 2 Str. 925.

In the case at bar, after hearing all the evidence concerning the general character of the witness Snow, we think the government might properly introduce the evidence which was objected to. The circumstances thus proved were such as naturally excite in the mind a belief that a woman who would so conduct herself, would be more likely to commit the fact alleged against her, than if her deportment had been modest and discreet.

We all think that the objections made by the counsel for the defendant cannot prevail, and that the defendant must receive sentence in pursuance of the verdict.

Digitized by Google

WILLIAM SANDERS *versus* JONATHAN RICHARDSON

Where the defendant, having the title to certain land, gave the plaintiff a bond stating that the plaintiff was in possession of the land and was to keep possession, and was to pay the defendant a certain sum of money in one year from the date, and the condition of the bond was, that the defendant should deliver to the plaintiff a deed of the land after the plaintiff should have performed what on his part was to be done, and the plaintiff continued in possession after the expiration of the year without paying the money, it was *held*, that he was not a tenant at will but merely a tenant at sufferance.

TRESPASS for breaking and entering the plaintiff's close in July 1827 and subsequently, and cutting and carrying away the plaintiff's grass and trees therein growing.

The defendant pleads, that the *locus in quo* was his soil and freehold.

The plaintiff replies, that the defendant, by his writing obligatory, dated December 1, 1824, demised the close to the plaintiff to hold as tenant at will, and that the defendant committed the trespasses during the continuance of the lease.

The bond above mentioned states that the defendant has taken a deed of the land from Jacob Sanders; that the plaintiff is in possession and is to keep possession of the same, and is to cut off the timber that is fit to saw, and carry the same to the defendant's mill in order that the defendant may have the profit of sawing the same, and that the plaintiff is to pay the defendant the sum of 110 dollars and interest in one year from the date; and the condition is, that the defendant shall deliver to the plaintiff a warranty deed of the land, after the plaintiff shall have performed what on his part is to be done.

The defendant, after oyer of the bond, demurs; and the plaintiff joins in demurrer.

Oct. 19th. *Hoar* and *G. F. Farley* supported the demurrer.

H. H. Fuller and *B. Russell* argued for the plaintiff.

April term 1834. PUTNAM J. delivered the opinion of the Court. The counsel for the plaintiff rests the cause on the point that this was a tenancy at will, continuing, and has contended, that the lessee may maintain trespass *quare clausum* against his landlord, under the facts set forth in the pleadings. But the labor and learning bestowed upon this point cannot be considered to be material in

Digitized by Google

the case before us, as we are all clearly of opinion that the plaintiff was not a tenant at will but a tenant at sufferance *merely*, after the non-performance of the things which should have been performed and the expiration of the year within which the plaintiff should have fulfilled the contract. It follows, therefore, that the defendant's rejoinder is good, and that the defendant shall recover his costs.

Sanders v. Richardson

JEREMIAH WHITEHEAD *versus* BENJAMIN F. VARNUM.

If a debtor imprisoned on execution is admitted to the liberties of the yard upon giving a bond with a surety approved by only one justice of the peace, the gaoler is liable for an escape; for the bond is not conformable to the statutes of 1784, *c.* 41, § 8 and 1811 *c.* 167, § 1, unless the surety is approved by the creditor or by two justices of the peace.

In an action of debt for an escape, it was *held*, that the plaintiff was entitled to interest from the date of the writ, and not from the time of the escape.

UPON a case stated it appeared that this was an action of debt against the sheriff of Middlesex, for the alleged escape of one Loring, who had been committed on execution. Loring was admitted to the liberty of the yard, upon giving bond to the defendant's deputy, the gaoler, conformably to the statutes, except that the surety in the bond was not approved by the plaintiff, and approved by one only, instead of two justices of the peace *quorum unus*. If upon these facts the plaintiff could sustain his action, the defendant was to be defaulted, and judgment was to be rendered for such sum as the Court should direct; otherwise the plaintiff was to be nonsuit.

The action was commenced before the enactment of *St.* 1833, *c.* 134, abolishing the action of debt for an escape.

Wilde, for the plaintiff, insisted, that to bring the bond within the statutes, the surety should have been approved either by the creditor, or by two justices of the peace. *St.* 1784, *c.* 41, § 8; 1811, *c.* 167, § 1. Oct. 19th

Buttrick, *contrà*, argued that the statute provision for an approval of the surety, was not designed for the benefit of the creditor, but to protect the debtor from oppression by the gaoler; and that if the gaoler was willing to accept the bond

Digitized by Google

Whitehead v. Varnum.

offered, no approval of the surety was necessary. *Bartlett* v. *Willis*, 3 Mass. R. 86; *Cargill* v. *Taylor*, 10 Mass. R. 208 Anc. Chart. 565; 2 Inst. 386; Com. Dig. *Parliament*, *R* 16. The clause in *St.* 1784, *c.* 41, that two justices of the peace "shall be called to approve," &c., is impliedly repealed by *St.* 1811, *c.* 85. *Ellis* v. *Paige*, 1 Pick. 43.

April term 1814.

PUTNAM J. delivered the opinion of the Court.

The defendant is answerable in this action, unless his deputy took a bond conformable to the statute, when he permitted the debtor, who was imprisoned, to have the liberty of the yard.

The *St.* 1784, *c.* 41, § 8, provides "that such prisoner shall give bond with sufficient surety or sureties, in double the sum for which he is imprisoned, conditioned, that from the time of executing such bond, he will continue a true prisoner in the custody of the gaoler, and within the limits of the prison, until he shall be lawfully discharged, without committing any manner of escape; and in order to prevent any oppression under pretence of the surety or sureties being insufficient, two disinterested justices of the peace, *quorum unus*, shall be called to approve of the surety or sureties, and the same being approved by them, shall be deemed sufficient."

In the case at bar, the bond has been approved by only one justice of the peace *quorum unus*. The *St.* 1811, *c.* 85, leaves the statute of 1784, *c.* 41, in force, but makes it lawful for the prisoner to enter upon any estate within the exterior bounds of the yard, without breach of the condition. The provision in the statute first cited, remained unaffected by the other statute cited.

The *St.* 1811, *c.* 167, provides for the liberty of the yard, if the debtor shall give bond, &c., to be approved by the creditor or two justices *quorum unus*.

In the case at bar there has not been any approval of the bond by the creditor.

The result is, that before the statute last cited, the law required the bond to be approved by two justices *quorum unus*, and afterwards, that there should be either such an approval or the consent of the creditor himself.

It is very clear, therefore, that the bond was not conformable to the law, and that the liberty given to the prisoner without such bond, is an escape.

Digitized by Google

This action is debt for the escape, and the measure of damages, is the debt and costs. Whitehead v. Varnum.

According to the agreement of the parties, therefore, the defendant is to be defaulted.

Buttrick objected to the allowance of any interest. *Rawson v. Dole*, 2 Johns. R. 454. Oct. 17th, 1834.

Per Curiam. The plaintiff is entitled to interest, not from the time of the escape, but from the date of the writ.

William H. Mayo *et al. versus* Henry Fletcher.
The Same *versus* Daniel Shattuck.

Where a mortgager of leasehold premises reserves in the mortgage a right to remain in possession until breach of the condition, and he holds over; the law will not imply an assumpsit to pay rent to the mortgagee during the time of holding over and previous to an entry by the mortgagee.

The title to the premises in such case after a tender of performance made subsequently to the breach of the condition, cannot be tried in an action of assumpsit for rent alleged to have accrued during such holding over.

Such mortgagee, having never entered, cannot maintain trespass *quare clausum fregit* against a person entering and occupying by permission of the mortgager before condition broken and holding over after a breach.

The case of *Mayo et al. v. Fletcher*, was trespass for breaking and entering the plaintiffs' dwellinghouse.

In the Court of Common Pleas it appeared, that in March 1831, Daniel Blaisdell assigned to the plaintiffs all his property, in trust for the benefit of his creditors. In pursuance of the trust the plaintiffs sold by public auction to Daniel Shattuck, all their right in certain land of which they were possessed for a term of years, and in a dwellinghouse, standing on land not owned by them, and gave him a deed of assignment indorsed upon the indenture of lease. Half of the purchase money was paid by Shattuck on receiving the deed, and for the residue (275 dollars) he gave his note to the plaintiffs, payable in four months, and at the same time executed and delivered to them a deed of mortgage as collateral security for the payment of the note according to its tenor. By the terms of the mortgage

Digitized by Google

Mayo v. Fletcher.

Shattuck was to possess and occupy the premises until there should be a breach of the condition. Shattuck soon after took possession, and the defendant, by permission of Shattuck and as his tenant, occupied the premises from May 1831, to the time of the trial. The note in question was not paid at its maturity, but soon afterward the amount due upon it was regularly tendered by Shattuck to one of the plaintiffs, and was refused. No formal demand of payment of the note was made. At the expiration of one month from the maturity of the note, the plaintiffs demanded a month's rent of Shattuck, and a suit against him for such rent was pending at the time of the trial. Afterwards the plaintiffs gave regular notice in writing to Fletcher to quit the premises, and after the expiration of twenty-four days from giving the notice this suit was commenced. The plaintiffs never entered into the premises or had the actual possession of the same, after they became the mortgagees thereof. Fletcher knew of the existence and the general tenor of the mortgage, before he had notice to quit, and that the note was unpaid at its maturity. He also knew of the tender and refusal above mentioned. The premises were occupied by Blaisdell until a short time before the sale to Shattuck.

In the Court of Common Pleas held by *Williams* J., it was adjudged that the action could not be maintained; whereupon the plaintiffs filed exceptions.

The case of *Mayo et al.* v. *Shattuck* was assumpsit to recover one month's rent of the dwellinghouse above mentioned, alleged to have accrued after the breach of the condition of the mortgage. The facts before stated made a part of this case. No express promise to pay rent was pretended, but the plaintiffs relied on an implied promise or obligation. Shattuck claimed the dwellinghouse as his own property. In the Common Pleas *Williams* J. ruled that the action could not be maintained; to which decision the plaintiffs filed exceptions.

The cases were argued in writing by *W. Hilliard* and *F. Hilliard* for the plaintiffs, and *Ames* for the defendants.

In the action against Shattuck it was contended on the part of the plaintiffs, 1. that payment of the note being neither made nor tendered on the 4th of September, 1831, the condition of the mortgage was then broken and the property in question

Digitized by Google

was forfeited to the plaintiffs without right of redemption. There is no right to redeem the leasehold, for it is personal estate. 4 Dane's Abr. 197; *Homes* v. *Crane*, 2 Pick. 607; *Parks* v. *Hall*, ibid. 206; Yelv. (Metcalf's edit.) 179 *a*, note; 2 Bigelow's Dig. 187; 2 Bl. Com. 386; *Ex parte Gay*, 5 Mass. R. 419; *Montague* v. *Smith*, 13 Mass. R. 399; *Chapman* v. *Gray*, 15 Mass. R. 444. Whether a mortgage of a leasehold interest in land is redeemable at common law, is not material, for our statutes are intended to cover the whole ground, so far as regards a right in equity to redeem, and it is apparent that they apply exclusively to what is technically called *real estate*, and not to a chattel interest in land. *Bartlett* v. *King*, 12 Mass. R. 545; *Commonwealth* v. *Cooley*, 10 Pick. 39; *Statutes* 1783, *c.* 37, § 6; 1783, *c.* 32; 1788, *c.* 51; 1785, *c.* 22, § 2; 1798, *c.* 77, § 1, 2; 1804, *c.* 103; 1815, *c.* 137; 1818, *c.* 98; 1821, *c.* 85. But if a leasehold interest is redeemable, there was no right to redeem the house; which was a personal and not a real chattel. *Wells* v. *Banister*, 4 Mass. R. 514; 4 Dane's Abr. 197; *Ashmun* v. *Williams*, 8 Pick. 402; *Woodruff* v. *Halsey*, ibid. 333; *Marcey* v. *Darling*, ibid. 283. The mortgaged premises became forfeited on non-payment of the money, without any act of the plaintiffs to take possession, for the legal property had passed, subject to be divested by an act on the part of Shattuck. Yelv., *Homes* v. *Crane*, *Parks* v. *Hall*, and 2 Bigelow's Dig. before cited. From being a mortgager or *quasi* tenant for years, not liable to rent, Shattuck became a tenant at will, and as such chargeable with a reasonable rent. There was an occupancy by Shattuck, not personally, but by his tenant Fletcher; who cannot dispute Shattuck's title, but must pay him the rent agreed for, and therefore cannot be compelled to pay it over again to the plaintiffs. *Watertown* v. *White*, 13 Mass. R. 477.

On the part of Shattuck it was said, that the relation of landlord and tenant does not exist in this case. The parties are adverse claimants of the same property, and the real question between them is the question of title; which cannot be tried in an action of assumpsit. 3 Stark. Ev. 1513; *Codman* v. *Jenkins*, 14 Mass. R. 96; *Hildreth* v. *Thompson*, 16 Mass. R

Digitized by Google

Mayo v. Fletcher.

191; *Allen* v. *Thayer*, 17 Mass. R. 299; *Henwood* v. *Cheeseman*, 3 Serg. & Rawle, 500; *Smith* v. *Stewart*, 6 Johns. R. 46. Nor will assumpsit lie against one man for use and occupation by another, unless such occupation was permitted by the plaintiff upon the defendant's request. *Naish* v. *Tatlock*, 2 H. Bl. 323.

The plaintiffs, being mortgagees, are not entitled to rent until actual entry, or, in the case of a chattel, actual possession. *Fitchburg Man. Co.* v. *Melven*, 15 Mass. R. 268; *Gibson* v. *Farley*, 16 Mass. R. 280; *Wilder* v. *Houghton*, 1 Pick. 87. Here there has been no actual possession by the plaintiffs under the mortgage. Shattuck was entitled to the possession by the terms of the mortgage, and his letting the premises to Fletcher was not a wrong upon the plaintiffs. *Newall* v. *Wright*, 3 Mass. R. 152.

If Shattuck is a tenant, he is tenant only upon the same terms as to rent, as before the expiration of the four months specified in the mortgage. No new contract has been made.

In reply it was denied that the facts in the case show either an adverse claim of title by Shattuck previously to the commencement of the suit, or that the suit was brought for the purpose of trying the title; one or the other or both of which are necessary to the application of the principle and authorities adduced on the part of Shattuck.

In opposition to the remark, that Shattuck was not liable because he did not occupy personally, the plaintiffs referred to 3 Stark. Ev. 1512, and *Bull* v. *Sibbs*, 8 T. R. 327.

In the action against Fletcher, the plaintiffs contended, first, that they had a possessory title in themselves. 1. When this action was commenced, they were absolute owners of the *locus in quo*. Or, 2. after maturity of the note the license to Shattuck to remain in possession was at an end, and the plaintiffs, as mortgagees, had an immediate right of entry. Nor was this right affected by the tender made after condition broken. *Maynard* v. *Hunt*, 5 Pick. 243.

Secondly, there was a wrongful entry or retaining of possession by the defendant. By entering without the permission of the plaintiffs as mortgagees, he became a trespasser. *Keech* v. *Hall*, 1 Doug. 21. By retaining possession after reasonable

Digitized by Google

notice to quit, Shattuck, the mortgager, would have been a trespasser, at the mortgagees' election, and the defendant as his tenant can stand in no better situation. *Danforth* v. *Sargent*, 14 Mass. R. 491; *Newall* v. *Wright*, 3 Mass. R. 138; *Goodwin* v. *Richardson*, 11 Mass. R. 469; *Erskine* v. *Townsend*, 2 Mass. R. 493; *Taylor* v. *Weld*, 5 Mass. R. 120.

On the part of Fletcher it was urged, that under the express agreement in the mortgage Shattuck had a right to the exclusive possession and might lawfully let the premises to Fletcher; 1 Powell on Mortg. (Rand's edit.) 155; *Mersereau* v. *Runyan*, 11 Johns. R. 534; *Newall* v. *Wright*, 3 Mass. R. 152; and if Shattuck's right as a purchaser was defeated by the non-payment of the note, Fletcher by holding over became a tenant at sufferance, and consequently he was not liable to an action of trespass until the true owner should have made an actual entry. *Rising* v. *Stannard*, 17 Mass. R. 288; *Keay* v. *Goodwin*, 16 Mass. R. 4; *Allen* v. *Thayer*, 17 Mass. R. 299; *Fletcher* v. *M'Farlane*, 12 Mass. R. 46; *Smartle* v. *Williams*, 1 Salk. 246.

The plaintiffs were not in possession. By the mortgage they have acquired an *interesse termini* in the premises, but they are not thereby possessed, and cannot maintain trespass, without an actual entry. 2 Bl. Com. 144; Bac. Abr. *Leases*, *M*; *Cook* v. *Harris*, 1 Ld. Raym. 367.

Shattuck, under whom Fletcher justifies his possession, is the lawful owner of the premises. Without reference to the nature of this property, whether it is real or personal, redeemable or irredeemable, it is denied that a forfeiture has been incurred. In the case of a mortgage, whether of real or personal property, the mortgagee's title is not absolute until entry made or possession taken after condition broken, and a tender before such entry or possession discharges the mortgaged property, though the debt remains. *Darling* v. *Chapman*, 14 Mass. R. 101; *Jackson* v. *Crafts*, 18 Johns. R. 110.

In reply the plaintiffs said, that the provision authorizing Shattuck to remain in possession was a mere personal privilege, which was not assignable, and that Fletcher was a stranger to the plaintiffs.

A wrongful holding over may amount to a trespass, although

Digitized by Google

Mayo v. Fletcher.

the entry was rightful. A tenant at will who holds over after an express determination of his estate by a notice to quit, is not a tenant at sufferance, but may be sued in an action of trespass. *Newall* v. *Wright*, 3 Mass. R. 138; *Rising* v. *Stannard*, 17 Mass. R. 282.

It is objected that the plaintiffs were not in possession; but Fletcher, claiming under Shattuck, is estopped by the mortgage from denying that the plaintiffs had such a right of possession as will sustain this action.

Upon non-performance of the condition of a mortgage of real estate, the property became absolutely forfeited at law, without entry. 2 Cruise's Dig. 81, 83; *St.* 1821, *c.* 85, § 2; *Maynard* v. *Hunt*, 5 Pick. 243. But this property was personal estate, irredeemable, like real estate at common law, after condition broken. And property, in personal estate, carries with it the possession. The tender did not discharge the mortgage. *Davis* v. *Maynard*, 9 Mass. R. 242.

April term 1834.

PUTNAM J. delivered the opinion of the Court. The question in the first case is, whether the plaintiffs can maintain the action of trespass *quare clausum fregit*.

The entry of the defendant under Shattuck within the four months, was lawful. *Newall* v. *Wright*, 3 Mass. R. 152. He was in the same situation as the mortgager would have been in, if he had kept the possession himself during that time. The legal estate was in the mortgagees, but the effect of the agreement between the mortgager and the mortgagees amounted to a lease to the mortgager for the four months. 1 Powell on Mortg. (Rand's edit.) 155. The mortgager did not pay the note on the day when it became due, but he tendered the money to the plaintiffs within a short time afterwards.

There is no doubt but that the mortgagees, after the breach of the condition, might have lawfully entered; and if there had not been any such agreement to the contrary, they might have entered before the breach of the condition; or they might have maintained their writ of entry and have recovered the possession, without any notice to the mortgager to quit. The mortgager had less rights than a tenant at will would have had He would not have been entitled to the emblements, as a tenant at will would have been.

Digitized by Google

But while the mortgager, or any persons under him, are by the mortgagees permitted to remain in possession, and the mortgagees omit to enter, the mortgager and those who are in under him, are in contemplation of law taking the rents and profits to his and their own account. So the mortgager may sell the estate, subject to the condition; and he may maintain trespass or entry *sur disseisin* against a stranger. *Willington* v. *Gale*, 7 Mass. R. 138.

And the assignee of the mortgager is not liable in trespass for the rents and profits accruing between the commencement of the action to foreclose and the time of taking possession upon execution. *Wilder* v. *Houghton*, 1 Pick. 89. In *Moss* v. *Gallimore*, 1 Dougl. 282 [269], Lord *Mansfield* said, "A mortgager is not properly a tenant at will to the mortgagee, for he is not to pay him rent. He is so only *quodam modo*." "Where the mortgager receives the rent by *tacit* agreement with the mortgagee, it is in the power of the latter to put an end to the agreement when he pleases."

If the mortgager had remained in possession, and had held over after the four months, he would have been afterwards a tenant at sufferance to the mortgagees. "A tenant at sufferance (says Lord *Coke*, Co. Lit. 57 *b*,) is he that at first came in by lawful demise, and after his estate ended continueth in possession and wrongfully holdeth over." And the defendant, coming into the possession within the four months, and holding over afterwards wrongfully in the eye of the law, would be a tenant at the sufferance of the mortgagees. They could enter upon him just when they pleased; and if the defendant had re entered, the mortgagees might have maintained trespass *quare clausum fregit* against him.

The mortgager has a right to possession, until the mortgagee brings his ejectment, or until entry by the mortgagee. *Rex* v. *St. Michaels*, 2 Doug. 632 [610]. Per Lord *Mansfield*. "After the mortgagee has got into possession he might gain a settlement," but not before, although he has the legal estate. "If a term is assigned by way of mortgage with a clause of redemption, the lessor cannot sue the mortgagee as assignee of all the estate, &c. of the mortgager, even after the mortgage has been forfeited, unless the mortgagee has taken the actual possession."

Digitized by Google

Mayo v. Fletcher.

Eaton v. *Jaques*, 2 Doug. 455. And *Buller* J. thought that the assignment were absolute, the action (debt for rent) would not lie without possession. Ibid.

"As to all the world, except the mortgagee, the mortgager is considered as the owner of the land, until an actual entry under the mortgage." *Goodwin* v. *Richardson*, 11 Mass. R. 473.

In *Rising* v. *Stannard*, 17 Mass. R. 288, this Court held, that an action of trespass will not lie against a tenant at sufferance before actual entry by the landlord.

In *Danforth* v. *Sargeant et al.* 14 Mass. R. 491, the defendants contended, (manifestly against law,) that where the tenant held over, the landlord could not obtain possession unless by process of law. But the Court said, that the landlord might "*enter at pleasure* and order the lessee out," and if he should hold over, that would be a trespass.

If, as in *Fitchburg Cotton Man. Corp.* v. *Melven*, 15 Mass R. 268, there had been an entry and eviction, the lessee of the mortgager might have been treated as a trespasser or disseisor. But there has not been any entry by the plaintiffs for condition broken; nor have they obtained actual possession of the premises.

But if the plaintiffs were the absolute owners, when the term of four months expired, the defendant, coming in as he did by title, could not be treated as a trespasser before entry by the plaintiffs upon him. *Lifford's case*, 11 Co. 51.

Whether the term for years became absolute or not makes no difference in regard to the right of the plaintiffs to maintain trespass against the defendant, for he came in by title; though he held over by wrong, the plaintiffs could not maintain trespass against him before they entered, even if Shattuck had been a disseisor.

For these reasons we are all of opinion that the plaintiffs must become nonsuit.

The case of the plaintiffs against Shattuck is assumpsit for one month's rent. We are referred to the statement of facts contained in the case of the plaintiffs against Fletcher. By that statement it is agreed, that the defendant mortgaged the prem-

Digitized by Google

ises to the plaintiffs, to secure his note for $275 in four months; that he was to retain the possession until default of payment; that the money was not paid at the day, but was tendered shortly after by the defendant and refused by the plaintiffs; that Fletcher occupied under the defendant, and held the possession over the four months, and for the month for the rent of which this action is brought, as well as for the time after the expiration of that month until the commencement of that action against Fletcher; and that the plaintiffs have not made any entry into the premises. It is agreed in the case at bar, that the defendant claims to own the dwellinghouse.

The plaintiffs claim to own the premises, which consist of a term of years, with a dwellinghouse. They contend that this is personal property, a chattel real, which vested in them absolutely, without any act or entry on their part to be done, upon the breach of the condition; and they insist, that inasmuch as the money was not paid at the day, the defendant ceased thenceforward to have any right to redeem the same.

Enough is agreed by the parties to satisfy the Court, that the title to the premises is contested; it is contended on the part of the defendant that he, as mortgager, was rightfully taking the profits, as the plaintiffs have not entered upon the premises for condition broken; and on the part of the plaintiffs, that the property became absolutely vested in them, upon the failure of the defendant to pay the note at its maturity. It is agreed that there has not been any express promise to pay rent. The claim of the defendant is wholly adverse. For if he is to be considered as a mortgager in possession after condition broken and before entry by the mortgagees, it is clear that he is not accountable for the rents. *Fitchburg Cotton Man. Corp.* v. *Melven*, 15 Mass. R. 268; *Gibson* v. *Farley*, 16 Mass. R. 280; *Wilder* v. *Houghton*, 1 Pick. 87. The law will not imply an assumpsit under these circumstances. We refer to the cases cited by the counsel for the plaintiff, to that point, and to *The City of Boston* v. *Binney*, 11 Pick. 1, which has been published since this cause was argued.

Being all clearly of opinion, that the relation of landlord and tenant has not existed between the parties during the time for which the plaintiffs sue for the use and occupation of the prem

Digitized by Google

Mayo v. Fletcher.

ises, and that the title to the same cannot be tried in this action, the plaintiffs must become nonsuit.

Samuel Haven *et ux.*, Appellants, *versus* Mary Foster *et al.*
Samuel F. Haven *et al. versus* Mary Foster *et al.*

The making of a codicil, duly attested to pass real estate, and referring to the will, is a republication of the will, so as in effect to incorporate the codicil with the will, and give to such combined instrument the same effect as if executed at the date of the codicil.

A testator, by his will, gives one half of all his estate to his brother John for life, and the other half, together with the remainder of the first half, in equal shares and in fee simple to all the children of his brother Andrew and his sister respectively, with survivorship if any of them shall die in minority. He afterwards purchases other lands, and then makes a codicil, which he directs to be annexed to the will and to be considered and taken as part thereof, and in which he revokes and annuls every bequest and devise made by the will to the children of his sister, and gives all and every part of his estate, of whatever description, which is in the will in any way given to the children of his sister, to the children of his brother Andrew, and ratifies and confirms the will in every thing except where it is revoked and altered by the codicil. It was *held*, that the will was republished by the codicil; that it contained words sufficient to embrace all the testator's estate held at the time of making the codicil, and of course no part of the property descended as intestate estate; that the clause of revocation in the codicil extended to the after-purchased land; and that the portion of the estate, including the after-purchased land, which but for the clause of revocation would have gone to the children of the testator's sister, was, by the codicil, devised to the children of Andrew.

On the 24th of October, 1820, Thomas Foster made his last will, in which he directs his executors to invest 1500 dollars in bank stock, and to pay the interest or dividends thereof to Hannah Newell during her life.

He then proceeds: — "I give, bequeath and devise to my brother John Foster the use and improvement of one half of all my estate, except said 1500 dollars, during his natural life, and the other half, except said sum of 1500 dollars, in equal shares and in fee simple, to all the children of my brother Andrew Foster, and my sister Elizabeth Haven, respectively, who shall be living at the time of my decease, and the share o

Digitized by Google

any one or more of them who shall die a minor, to the survivors of them."

"From and after the death of said Hannah Newell, I give and bequeath the said 1500 dollars to the abovementioned children, in equal shares, and the share of any one of them who shall die in minority, to the survivors."

"From and after the decease of said John Foster, I give, bequeath and devise that part of my estate, the use and improvement of which is above given to him during his natural life, and all other estate which I have, and all right, title, interest and claim which I have in and to any estate not above bequeathed and devised, to the abovementioned children, in equal shares and in fee, and the share of any of said children who shall die in minority, to the survivors."

On the 3d of February, 1831, the testator made a codicil, written on the same paper, as follows: — "Whereas I, Thomas Foster above named, have heretofore made and duly executed the foregoing instrument, in writing, as and for my last will and testament, now I, said Thomas Foster, do hereby declare this present writing to be a codicil to said will and testament, and direct the same to be annexed thereto and to be considered and taken as part thereof; and firstly, I do hereby revoke and annul each and every bequest and devise made, given and bequeathed, in and by said will and testament, to the children of my sister Elizabeth Haven; and secondly, I give, bequeath and devise all and every part of my estate, of whatever description, which is in said will and testament in any way given and bequeathed to said children of Elizabeth Haven aforesaid, to the children of my brother Andrew Foster, mentioned in said will and testament; and lastly, I do hereby ratify and confirm said will and testament in every thing except where the same is hereby revoked and altered as aforesaid."

The will and codicil were executed in due form to pass real estate, and were proved on May 17, 1831.

The testator's brothers Andrew and John, and his sister Elizabeth, survived him.

Partition of all the real estate of which the testator died seised, was made by commissioners appointed by the judge of

Digitized by Google

Haven v. Foster.

probate. They set off and assigned one half of the whole real estate to John Foster for life, and the other half to the four children of Andrew. The judge of probate passed a decree accepting the report of the commissioners, and from this decree two appeals were taken.

Samuel Haven and Elizabeth his wife appealed, because as to the lands acquired by the testator after the making of the will the testator died intestate, and one third of the same descended to his sister, Elizabeth Haven, the appellant, as one of his heirs at law.

Samuel F. Haven, and Francis Hilliard, in right of his wife Catharine D. H. Hilliard, appealed, because the commissioners did not assign to Samuel F. and Catharine, any part of the real estate, whereas by the legal operation of the will and codicil, they, as the only surviving children of the testator's sister Elizabeth Haven, are seised of one moiety of all the lands which the testator acquired after the making of the will, the one half in possession, the other half subject to the life estate of the testator's brother John Foster; or if not so seised of a moiety, are seised of two sixth parts, subject to a life estate of John Foster in one sixth part.

The cases were argued in writing by *Metcalf* and *F. Hilliard* for the appellants, and by *Sohier* and *A. Hilliard* for the appellees.

In behalf of the appellants, Samuel and Elizabeth Haven, it was contended that the codicil did not have the effect of republishing the will, and consequently that the real estate acquired after the making of the will, descended to the heirs at law.

The heir at law is not to be disinherited except by express words or necessary implication. Pow. on Devises, 566; *Denn* v. *Gaskin*, Cowp. 661; *Parsons* v. *Freeman*, 3 Atk. 747.

The question, what constitutes a republication of a will, has never been decided in Massachusetts. The remark of *Putnam* J., in *Miles* v. *Boyden*, 3 Pick. 216, that a codicil is considered a republication, so that after-purchased lands pass by the will, is a mere dictum.

Upon principles of reason and common sense, a codicil ought not to have the effect of passing after-purchased lands,

Digitized by Google

unless it in some way mentions or alludes to them. More especially is this the case, when these lands bear a large proportion (as in the present instance) to the testator's whole property. *Lane* v. *Wilkins*, 10 East, 238.

In England, after the statute of frauds, it was at first held that there could not be an implied republication. The modern English doctrine, that a codicil is a republication and passes after-purchased lands, is derived from the case of *Acherly* v. *Vernon*, Com. Rep. 381, 3 Bro. Parl. Cas. 85, 9 Mod. 68, (best reported in 10 Mod. 518,) but the facts of that case were peculiar and do not warrant the subsequent decisions founded upon it; and although in England the law on this point may be regarded as no longer open to discussion, yet it has been there so strenuously resisted, that it can hardly be considered as binding in this commonwealth. 6 Cruise's Dig. *tit.* 38, *c.* 7; *Barnes* v. *Crowe*, 1 Ves. jun. 486; *Pigott* v. *Waller*, 7 Ves. 98; *Guest* v. *Willasey*, 2 Bingh. 429, and 3 Bingh. 614; 1 Rob. on Wills, *c.* 3. The facts in *Acherly* v. *Vernon* were such as to require the judgment there given, independently of the question whether a codicil *per se* amounts to a republication. *Bridgewater* v. *Bolton*, 1 Salk. 236; *Lane* v. *Wilkins*, 10 East, 253. In connexion with *Barnes* v *Crowe*, they cited Pow. on Dev. 673, and *Carleton* v. *Griffin*, 1 Burr. 554; and in connexion with *Doe* v. *Davy*, Cowp. 158, they cited *Heylyn* v. *Heylyn*, Cowp. 130; 6 Cruise's Dig. 109, 110; *Goodright* v. *Glazier*, 4 Burr. 2512.

If the English doctrine is law in this commonwealth, it must of course be received subject to the well established exception, that where the effect of a codicil is expressly confined to the lands devised by the will, it does not operate as a republication of the will, so as to make it pass after-purchased lands. *Heylyn* v. *Heylyn*, Cowp. 132; Pow. on Dev. 676; *Strathmore* v. *Bowes*, 7 T. R. 482; *Bowes* v. *Bowes*, 2 Bos. & Pul. 500; *Goodtitle* v. *Meredith*, 2 Maule & S. 5; *Rogers* v. *Pittis*, 1 Addams, 37; *Parker* v. *Biscoe*, 8 Taunt. 699; *Smith* v. *Dearmer*, 3 Young & Jerv. 278; *Dunlap* v. *Dunlap*, 4 Desaus. 321; *Kendall* v. *Kendall*, 5 Munf. 272. The case before the Court is parallel with *Bowes* v. *Bowes*, except that here the codicil contains a ratifying and confirm

Digitized by Google

Haven v. Foster.

ing clause, but this is mere form and has no effect towards republishing the will. So of the direction that the codicil be taken as part of the will. *Crosbie* v. *M'Dowall*, 4 Ves. 610; *Pigott* v. *Waller*, 7 Ves 119; *Gibson* v. *Montford*, 1 Ves sen. 494; *Gibson* v. *Rogers*, Ambl. 93; *Barnes* v. *Crowe*, 1 Ves. jun. 492; *Doe* v. *Davy*, Cowp. 158; *Potter* v. *Potter*, cited in Pow. on Dev. 660, 672, *Lane* v. *Wilkins*, 10 East, 242.

In the case of Samuel F. Haven and his sister, children of Elizabeth Haven, appellants, it was argued, that although in the construction of a will the intention of the testator governs, yet it governs in subordination, generally, to the rules of law, and more particularly, to the principle, that the testator is always supposed to understand the legal effect of his own language. *Hawley* v. *Northampton*, 8 Mass. R. 37; *Acherly* v. *Vernon*, 9 Mod. 77; Shep. Touch. 87; *Dawes* v. *Swan*, 4 Mass. R. 215; *Bowes* v. *Bowes*, 2 Bos. & Pul. 506; *Goodtitle* v. *Otway*, 7 T. R. 399; *Davis* v. *Hayden*, 9 Mass. R. 518; *Bott* v. *Burnell*, 11 Mass. R. 167.

The republication, if any, in the present case, is effected by the ratifying and confirming clause of the codicil, and not by the previous revoking clause and devising clause, nor by the codicil generally. *Bowes* v. *Bowes*, 2 Bos. & Pul 500; *Strathmore* v. *Bowes*, 7 T. R. 482; *Smith* v. *Dearman*, 3 Young & Jerv. 278; *Parker* v. *Biscoe*, 8 Taunt. 699; *Dunlap* v. *Dunlap*, 4 Desaus. 321; *Kendall* v. *Kendall*, 5 Munf. 272. As between these appellants and the appellees the republication of the will is admitted; and these appellants maintain, in support of their claim, this general position: — The revocation and devise contained in the codicil are confined to the lands which the testator owned at the making of the will, but the republication applies to the after-purchased lands also; the consequence is, that by the will and codicil taken together, the after-purchased lands go to the same persons, who, by virtue of the will alone, if no codicil had been made, would have taken the lands owned by the testator at the making of the will; and these appellants are entitled to the shares, and in the capacities, set forth in their reason of appeal. *Ex parte Ilchester*, 7 Ves. 377; *Strathmore* v *Bowes*, 7 T. R. 485; *Bowes* v. *Bowes*, 2 Bos. & Pul. 500

Digitized by Google

Doe v. *Hicks*, 8 Bingh. 475; *Johnston* v. *Johnston*, 1 Phillimore, 497; 5 T. R. 53, note; *Brant* v. *Willson*, 8 Cowen, 56; *Guest* v. *Willasey*, 2 Bingh. 429.

April term 1834

Shaw C. J. drew up the opinion of the Court. It is now a rule of law too well established to be shaken, and one upon which titles to property have long rested in this commonwealth, that a devise of real estate can take effect only as to estate, of which the testator is seised at the time of making the devise, that is, at the date of the execution of the will, and that however strongly the intention is expressed by the testator, to extend the operation of his last will, so as to make it pass the estate which he might afterwards acquire before his death, yet according to the rules of law such an intention cannot have effect. In this respect the law differs entirely from that which governs a gift of personal estate; it being a well known rule, that if such be the expressed intent, a last will and testament will operate to convey after-purchased personal estate, as effectually, as to pass the property held by the testator at the execution of his will. It is in vain now to question the soundness of the reasons, upon which this rule in regard to real estate is founded, or to insist that it often defeats the intentions of testators, or to contend that the rule in reference to personal property is more reasonable. It is to be maintained, because it is a rule of law, which has been adopted and practised upon in this commonwealth, and is one of those rules, upon which titles to property depend, to a great extent. *Hays* v. *Jackson*, 6 Mass. R. 149. [Altered by Revised Stat. *c.* 62, § 3.]

The reason upon which the rule is founded, may tend to illustrate it, and govern its operation. We take the reason of the rule to be, that a devise is deemed to be a species of conveyance, by which real estate is transferred by force of the statute of wills; that though its operation is necessarily postponed to the time of the death of the testator, and though the gift is conditional, depending upon the condition, that the will is not cancelled or revoked by the testator, and that the devise is not adeemed by the alienation of the estate by the devisor in his lifetime, or otherwise, yet when it does take effect upon the happening of the conditions, it is considered as relating back and taking effect by force of the devise, as a con

Digitized by Google

Haven v. Foster.

veyance and transfer of the estate. Then in analogy to the common law rule, that a conveyance can only take effect to pass vested estates, the devise, as to estates of which the devisor is not then seised, is inoperative and void. That such is the principle of the rule is manifest from this consideration, that in England the execution of a will, by which a devise is made, like that of a deed or any other instrument of conveyance, is to be proved by the party claiming title under it, whenever such title is drawn in question; and the probate of the will in an ecclesiastical court, is of no avail to give it effect, as a devise of real estate.

From this reason of the rule, we shall readily perceive the fitness of the other connected with and depending on it, which is equally well established, namely, that if the will be republished, then all the words contained in it, and which have reference to time, must be considered as applying to the time of the republication and not to that of the original will. The very same words, may embrace very different parcels and amounts of estate, as they are used at one time or at another. If they are words of description, more or less general, as "all my real estate;"—"all my real estate in such a county;"—"all my warehouses and wharfs in such a city;"—"all my wild lands," &c., it is manifest, that such words, used on one day, would embrace a different estate, from that included in the same description on another day, as the estate described by them may have been enlarged or diminished by acquisition or alienation, in the mean time. By the rule under consideration, the will is considered as speaking on the day of republication, and to have the same effect as if originally made on that day, and to embrace the subject-matter, as it exists at that time. Where, therefore, there is a general residuary clause, as if one devises all his real estate, or all the residue after specific devises, and afterwards acquires real estate, and does not republish his will, the residuary devise does not carry the after-purchased estate, because the devisee was not seised at the execution of the will. But if such will be republished, after the purchase of the real estate, it carries this real estate, because the words of the original, as used and spoken on the day of republication, embrace it in terms.

Digitized by Google

But to give a republication this effect, the words of the will must be of such a character, as if used at the date of republication, would include the estate in controversy. The proposition may be stated broadly, that to constitute a good devise, the intent to devise and the power of devising, must concur. In general, the reason why a devise does not take effect, to pass after-purchased estate, is not that there is not a manifest intent to pass all the estate, but because, the devisee not being seised at the time, the legal power of devising is wanting. The question is therefore usually argued as if it was merely a question of power, in which the fact of intent is immaterial. But we think the true question is, do the intent and the power both concur, and the legal consequence will be, to give effect to the devise where they do concur, but to declare it inoperative, if either is wanting.

If, therefore, the language of the original will be such, as if used at the date of the republication, it would not include the after-purchased estate in its terms or description; or, if the act of republication be accompanied with other provisions, indicating that it was the intention of the testator, to limit the operation of the will, as republished, to the same estate which was given, and which would legally pass by the original will, then, notwithstanding such republication, the devise will not include the after-purchased estate; because, although the power then exists to devise, yet the intent is wanting, and as both do not concur, the after-purchased estate does not pass.

It was upon a similar ground that the case mentioned in the argument was decided, first in the Court of King's Bench, *Lady Strathmore* v. *Bowes*, 7 T. R. 482, and afterwards in the House of Lords, *Bowes* v. *Bowes*, 2 Bos. & Pul. 500. It was a question of construction upon the words of the will and codicil. In the House of Lords, Lord *Thurlow* differed in opinion from the judges and chancellor, and was of opinion that the codicil operated as a republication of the will, and that it was sufficiently broad in its terms to include the after-purchased lands. But the judges, and the chancellor for the time being, Lord *Eldon*, were of opinion, that it was the intent of the testator only to change the trustees, and to give to the new trustees the same estate only as had been given by the will,

Digitized by Google

Haven v. Foster.

and therefore that although the codicil operated as a republication of the will, yet that such republication did not so operate, as to include the after-purchased estate, because it was the intent of the testator, as manifested in the codicil, that it should not be included. Lo d *Eldon* stated the principle thus: "the true question seemed to be, whether from the words 'my *said* lands' a special intention to *exclude* the after-purchased estate did not appear, in the same way as it would have appeared, had he referred to the lands originally devised by a description of locality; but that indeed, if their lordships were not satisfied that such a special intention did appear, the general rule respecting the operation of a republication, must operate in favor of the appellants," that is, operate so as to include the after-purchased lands in the devise. 2 Bos. & Pul. 507.

The principle was recognised and accurately stated by Lord *Ellenborough* in the case of *Goodtitle* v. *Meredith*, 2 Maule & S. 14. "The effect of the republication is, to give an operation to the codicil *per se*, and independently of any intention, so as to bring down the will to the date of the codicil, making the will speak as of that date, unless indeed a contrary intention be shown, in which case it will repel that effect."

It has been argued in the present case, that the rule of law, that the making of a codicil, duly attested to pass real estate, and referring to the will, shall be considered as a republication of the will, so as in effect to incorporate the codicil with the will, and give to such combined instrument the same effect, as if executed at the date of the codicil, has never been expressly recognised as a rule of law, in this commonwealth, and that upon principle, it ought not to be adopted. Upon this point, the Court are of opinion, that this is now to be considered as a settled rule of law, and standing upon the same grounds of reason and authority as most of those rules, upon which titles to property now rest, in this commonwealth. In many cases, questions may arise, which may not appear to have been decided in this commonwealth, partly on account of the greater simplicity of our titles and modes of conveyancing, in consequence of which such rules may not have been called into action, and partly from the want of reports of judicial decisions, until a comparatively recent period; yet when such questions

Digitized by Google

do arise, we resort to decisions of English courts of law and chancery, especially of a date prior to the revolution, with confidence, as a part of our own judicial history, and as the most satisfactory source of sound and correct principles of law.

Whatever may have been the differences of opinion among eminent judges, in regard to the correctness of the rule in question, we consider it now settled upon satisfactory authorities, commencing with the case of *Acherly* v. *Vernon*, and recognised and confirmed by a series of modern decisions, both in England and in this country. Without going into a detailed statement of these cases, we shall barely refer to some of the leading cases on the subject. *Acherly* v. *Vernon*, Com. Rep. 381; *S. C.* 10 Mod. 518; *Potter* v. *Potter*, 1 Ves. sen. 438; *Barnes* v. *Crowe*, 1 Ves. jun. 486; *Pigott* v. *Waller*, 7 Ves. 98; *Rowley* v. *Eyton*, 2 Mer. 127; *Goodtitle* v. *Meredith*, 2 Maule & S. 5; *Guest* v. *Willasey*, 2 Bing. 429; *Mooers* v. *White*, 6 Johns. Ch. R. 375; *Brownell* v. *DeWolf*, 3 Mason, 486; *Miles* v. *Boyden*, 3 Pick. 216; *Bowes* v. *Bowes*, 2 Bos. & Pul. 500. We take the rule settled by the authorities to be this, that *primâ facie*, the execution of a codicil to a will of lands, so executed itself as to be capable, within the statute, of passing lands, is a republication of such original will; and that this is more especially and unequivocally the case, where the codicil contains words declaring and confirming the original will to be in force, either in whole or so far as it is not altered or revoked by the codicil itself; that the effect of such republication is, to make the will operate in the same manner, as if executed at the time of such republication, unless a special intent is manifest in the codicil, to restrain such operation and give it a less extensive effect; and that where the will contains a residuary clause or words of general description, sufficient to embrace all or any particular description of real estate, of which the devisor is seised, the effect of such republication is, to make the will take effect and operate upon and pass any real estate falling within such description, which may have been purchased by the testator, after the date of the will, and before the republication, unless there is a manifest intent, expressed in the codicil itself, to confine

Digitized by Google

Haven v. Foster.

the operation of the will thus republished, to the same estate which the testator held, and upon which the will operated, at the period of its first execution.

It only remains to apply these rules to the will under consideration.

Thomas Foster made his will in October 1820, duly attested to pass real estate; and made a codicil, on the same paper, attested in like manner, on February 3, 1831, having purchased land during the intermediate period. The codicil recites the fact of having executed the will, declares the present instrument to be a codicil, directs it to be annexed to and made part of the will, and confirms the will in every thing, except where the same is thereby revoked and altered.

Whatever might be the implication from the mere fact of making a codicil, these words of express ratification appear to us to bring the case clearly within the authorities, making this codicil a republication.

The original will, after a provision for Hannah Newell, which is of no importance to the question, proceeds thus: — "I give and devise to my brother John Foster, one half of all *my estate* for his life; — the other half, in equal shares and in fee simple, to all the children of my brother Andrew, and sister Elizabeth, respectively." The testator then gave to the same children, the remainder in the other half, expectant upon the determination of John's life estate; and also all other estate which I have, and all right and title which I have in and to any estate, not above bequeathed and devised, to the same children, with survivorship, if either die in minority. The codicil, after the recitals, declaration and ratification already noticed, provides thus; — I do hereby revoke and annul each and every bequest and devise made, given and bequeathed, in and by said will and testament, to the children of my sister; — and secondly, I give, devise and bequeath all and every part of my estate, of whatever description, which is in said will and testament in any way given to said children of Elizabeth, to the children of my brother Andrew, mentioned in said will; and then come the words of ratification, in other respects.

What then is the effect of this codicil, regarded as a republication? Clearly to bring the date of the will to that of the

Digitized by Google

codicil, and to give the words of the will the effect they must have as *then* used. The words "*all my estate*," which at the date of the will did not include after-purchased lands, at the date of the codicil did include them. The intent to dispose of all his property was manifested by the original will; but the technical rule of law prevented it from operating upon lands, of which he was not then seised. At the date of the codicil, he was seised, he had the power to devise; the continuing intent to do so, is declared by the republication and confirmation of his will; and the intent and the power thus concurring, the devise took effect upon the after-purchased lands.

To test the effect of this republication, let us apply it to the devise to John Foster for life, in respect to which there are no restraining or qualifying words in the codicil. In the will the testator says, I give one half of all my estate to my brother John for his life. In the codicil, he says, I republish that devise; I still declare, by repeating and confirming the terms of my former devise, that I give and devise to my brother John one half of my estate for his life. Can there be a doubt, consistently with the authorities cited, that John takes a moiety of the after-purchased estate? We think there can be no doubt of this; and therefore that the real question is, not whether the will was republished, nor what would be the legal effect of such republication, if unrestrained and uncontrolled by particular provisions in the codicil itself, but whether in fact, the words of revocation and devise over, in this codicil, are so expressed as to confine their operation to the estate held by the testator at the date of the original will.

The words of the will, to which the terms "revoke" and "annul" apply, are, "each and every bequest and devise, made, given and bequeathed," &c., not the estate given; it alludes to no estate or property, but annuls the devise made. Had it stood simply upon the words of this revocation, without any devise over, it might have been plausibly contended, that to the extent of this revocation, the testator would have died intestate. If one give all his estate to seven persons, by name or by description, to take as tenants in common and not as joint tenants, (which clearly they would in this case, under the original will,) and the testator revoke the devise to three,

Digitized by Google

Haven v. Foster.

either by name or by description, to the extent of such revocation, there being no devise over, the estate is intestate. *Brownell* v. *DeWolf*, 3 Mason, 486. But here there is a devise over in these words: "I give and bequeath all and every part of my estate of whatever description, which is by said will in any way given to the children of Elizabeth, to the children of Andrew."

We think these words do not manifest a plain intent, or any intent, on the part of the testator, to limit the effect and operation of this devise over, to the very same estate which he had, at the time of the execution of the will.

It is plain, we think, that this devise over, was intended to be coextensive with the revocation before declared, of all which by the will was in any way given to Elizabeth's children. The effect of the republication, had it stood alone, would have been, to enlarge the estate given to John and to all the children, so as to include the after-purchased land. This is its legal effect, except so far as restrained by the terms of the codicil itself. By the terms of the codicil it was so far restrained as wholly to annul the devise to Elizabeth's children, and no further. To Andrew's children then, being unrestrained, it did operate to give half the after-purchased estate. But for the annulling and revoking words, it would have had the same effect, as to the part given to Elizabeth's children. What was taken from them therefore by these words, was their share of the estate, as enlarged and extended by the republication of the will, to include the after-purchased estate. The general result of this view, is this; that by the codicil, the will was republished; that by force of this republication, the will was enlarged in its operation so as to embrace the after-purchased lands; that by this enlarged operation, without words of restraint, the children of both families would have taken their respective shares, in the estate thus enlarged by the after-purchased lands; but that by the same codicil which effected the republication, the whole power of the will, which devised any thing to one family, was annulled and taken away, and ceased to have any operation either to give the lands devised by the original will, or the after-purchased lands, and that by force of the same codicil, the portion of estate, which

Digitized by Google

but for these words of revocation would have gone to one family, are given to the other.

Even a more strict and literal construction of this devise over, we think, would lead to the same result. The testator says, all and every part of my estate, which is *in and by said will, in any way* given, &c. Now in strictness, the after-purchased land is given by the original will. The codicil republishes, revives and gives new vigor to the will, without which the after-purchased land would not pass. But the words of devise, by which the estate passes, are contained in the will and not in the codicil. We think the estate devised over, was not confined to the estate which legally passed by force of the first will, but under the broader designation of "all estate of whatever description, in any way given by said will," may be included estate which passes by force of the terms of the will, as enlarged and made effectual by the codicil, including the after-purchased land.

This view of the subject, in effect disposes of the claim of the children of Mrs. Haven, as set forth in their reasons of appeal.

This claim is founded upon the assumption, that the will was republished by the codicil, that it operated as such to embrace the after-purchased lands, that the clause of revocation applied to such estate only, as the testator had at the time of the execution of the will, and that the general words of devise, made effectual by the republication of the will, were sufficient to pass a portion of the after-purchased estate to these children, and to this extent they are now entitled to claim as devisees. Such a claim seems entirely inconsistent with the manifest intent of the testator. The argument for these appellants must establish, that it was the general intent of the testator, as manifested by the will, to give them a portion of his estate, with the children of Andrew, that when such will was republished by the codicil, it is to be presumed that such intent continued, except so far as controlled by the express words of revocation, and these applied only to the estate originally held, and not to the after-purchased land, and therefore, that the devise continued in force, as to this. But we think the answer is plain, that the presumption of such continuing intent is con-

Digitized by Google

Haven v. Foster.

trolled and rebutted by the express words of the codicil, by which each and every bequest and devise made to them is revoked and annulled And although at this time the power to devise this after-purchased estate existed, the will and intent to do so were withdrawn by the same act which effected the republication. The will and codicil, by the rule stated, are to be construed together, as one instrument; and then the general rule of construction applies, that an instrument is to be so construed, as to give effect to every part, and carry into effect the general intent, if practicable. Here the will is confirmed, except so far as it is altered or revoked by the codicil. But to the extent of annulling every bequest and devise made to these appellants, it is altered by the codicil and so comes within the exception, and can derive no force from the words of confirmation and ratification.

There is another rule of construction, which might be resorted to if necessary, to carry into effect the intent of the testator, though we think it is not necessary in the present case The rule is, that when two or more acts are done at one and the same time, they shall be considered as done in that order of succession, which is best calculated to accomplish and carry into effect the object intended. As where A is seised of land, and several conveyances are made, by one instrument, or by several instruments executed simultaneously and so connected as to form in legal effect one transaction, as by A to B, by B to C, and by C mortgaged back to A, &c.: till the execution of the deed, B has no seisin and can convey nothing to C; but to give effect to the transaction, though simultaneously executed, A's shall be considered as first taking effect to pass the fee to B, and then B's deed to C will operate to pass the fee. Now here two things are accomplished by the execution of the codicil. It republishes the will, and thus extends its operation to the after-purchased estate; and it revokes and annuls every devise to certain of the devisees. Now considering it to be the manifest intent of the testator, that the revocation should be coëxtensive with the devise, so as to withdraw by the one, all which was before intended to be given by the other, we see no difficulty in applying the rule in question, and considering that the republi

Digitized by Google

cation shall first take effect, so as to extend the operation of the will to the after-purchased estate, and then the revocation, by which the devise thus enlarged, is revoked and annulled so far as it was given to the children of one family; and by the devise over the same portion of the estate, thus enlarged by the republication of the will, is devised to the children of the other family.

On the whole, we are of opinion, that in the present case, the will was republished by the codicil; that it contained words sufficient to embrace all the testator's estate, held at the time of making the codicil, which, as appears from the case, was all the testator's estate; that of course no part of his property descended as intestate estate; and therefore, that the appeal of Samuel Haven and wife, who claim as heirs at law, must be dismissed.

We are also of opinion, that the clause of nullification and revocation, contained in the codicil, extended to the whole of the testator's estate, as well the after-purchased lands as the estate held at the time of the date of the will; that the whole of the estate originally devised to the children of Elizabeth Haven, was by the codicil devised to the children of Andrew Foster; that the appellants Samuel F. Haven and others, took nothing by devise under the will and codicil, and that their appeal must be dismissed

Digitized by Google

SHERMAN WILLARD *versus* JOHN BUTLER, Principal, and HENRY P. HOWE, Trustee.

By the answers of one summoned as trustee, it appeared that he was a lessee at will of a paper mill; that by his agreement with the principal defendant as a laborer in the mill, the defendant was to receive his wages in orders, not negotiable, drawn by the respondent upon the owners of the mill, and in no other way, and if the defendan should be indebted to the owners at the time when an order was drawn, a discharge of such debt should be equivalent to an acceptance and payment of the order to the same amount; and that the defendant had not demanded any order for the wages due to him at the time of the service of the trustee process. There being no actual fraud in the contract, it was *held*, that the respondent was not chargeable as trustee.

HOWE, the supposed trustee, disclosed in his answers, that Butler was in his employment at the time of the service of the trustee process and had then been in his employment about four years; that Howe was in the employment of Ed garton, Whitcomb & Co., in Shirley, in the manufacture of paper, and had the control of the mill; that by his contract with them, they furnished him with the mill and the stock, and he manufactured the paper; that it was a part of the contract with them, that they should answer orders drawn upon them in favor of the laborers employed by him in the manufacture of paper in the mill, which orders were not to be negotiable, and that in this way all his hands should be paid by Edgarton, Whitcomb & Co.; that the only condition in relation to the orders was, that Howe should not draw for a greater amount than he was entitled to receive from Edgarton, Whitcomb & Co., in doing their work and for paper; that he accordingly agreed verbally with Butler, that Butler should work for him in the manufacture of paper, and should from time to time receive his pay in orders drawn upon Edgarton, Whitcomb & Co. as above mentioned, and in no other way; that at the time when this process was served upon Howe, there was due to Butler the sum of $219·06, for his work under his contract; that Howe had always been ready to draw orders in favor of Butler upon Edgarton, Whitcomb & Co., not negotiable, for the wages above mentioned, and had not been called upon by Butler for such orders and refused or neglected to draw them; that the understanding between Butler and Howe was, that if

Digitized by Google

Butler should be indebted to Edgarton, Whitcomb & Co. when Howe should draw an order in favor of Butler, a discharge of such debt should be equivalent to an acceptance and payment of the order to the same amount; and that during the whole time that Butler was in Howe's employment, Howe had sufficient funds in the hands of Edgarton, Whitcomb & Co., so that an order drawn upon them in favor of Butler for his work, would have been accepted.

The case was argued in writing.

B. Russell, for the plaintiff, contended that the respondent ought to be charged as trustee. The contract disclosed, so far as it operates as a discharge of the respondent, is, in law, fraudulent against the creditors of Butler, because it places funds in the hands of the respondent and locks them up from Butler's creditors, and at the same time leaves them subject to his control and disposal, and thereby prevents the operation of the trustee process. *Maine F. & M. Ins. Co.* v. *Weeks & Tr.* 7 Mass. R. 438; *Perry* v. *Coates & Tr.* 9 Mass. R 537; *Clark* v. *Brown & Tr.* 14 Mass. R. 271.

G. F. Farley for the trustee.

April term 1834

PUTNAM J. delivered the opinion of the Court. It appears that Edgarton, Whitcomb & Co. were the owners of the paper mill, that Howe (who is summoned as the trustee) was the lessee at will, and that he employed Butler, the principal, and the other laborers, who were to be paid by his orders upon Edgarton, Whitcomb & Co. This contract was made in 1829, and had been in operation until this suit.

And we do not perceive any thing in it, which is fraudulent. There is no suggestion that this arrangement was resorted to with a view to delay or defeat the claims of creditors, as was the contrivance in *Hooper* v. *Hills et Tr.* 9 Pick. 435.

The laborers were to be paid in this manner, as well for their own accommodation as for the benefit of the owners of the paper mill. For the latter received some advantage from the sale of their goods, and the former received some advantage from supplies to be furnished for their work, as might be necessary. If the laborers could live without taking up goods from Edgarton, Whitcomb & Co., they were entitled to receive money from them, in virtue of their agreement with

Digitized by Google

Willard v. Butler & Tr.

Howe to accept his orders. So there is nothing oppressive upon the laborers. If however it might be necessary for them to receive goods on account, as the work went on, there was a credit established, which might be very convenient for them.

If, when the wages should become due, Howe should refuse to draw his order according to his agreement, they would have a remedy against him immediately, for the breach of the contract. And if Edgarton, Whitcomb & Co. had not paid according to their agreement to accept, the laborer would have had a legal and immediate claim for the amount in cash.

But we think that the laborer could not have maintained an action for money for the wages, until there had been some default on the part of Howe, or Edgarton, Whitcomb & Co., in drawing or duly honoring the orders. If the principal defendant had demanded an order of Howe, and Howe had refused to give it, upon such refusal Howe would have been chargeable. *Maine F. & M. Ins. Co.* v. *Weeks*, 7 Mass. R. 439.

We all think that a creditor of the laborer has no right to interfere with this contract, and by this process to compel Howe to pay money instead of giving the order for the work.

Trustee discharged

Digitized by Google

INDEX.

ACTION.

By virtue of *St.* 1834, *c.* 189, a plaintiff in an action, founded on contract, brought against several defendants, might be allowed to discontinue as against one who had been defaulted, and proceed against the others. *Turner* v. *Bissell.* 192

See BILL OF EXCHANGE &c. 1, 10, 11. DEVISE, 11.

ACTION ON THE CASE.

A brig, which was towed at the stern of a steamboat employed in the business of towing vessels in the river Mississippi, below New Orleans, was, through the negligence of the master and crew of the steamboat, over whom those in charge of the brig had no control, brought into collision with a schooner lying at anchor. It was *held*, that the owner of the brig was not responsible for the damage sustained by the schooner. *Sproul* v. *Hemmingway.* 1

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADULTERY.

See EVIDENCE, 7.

AMENDMENT.

The plaintiff's declaration set forth by mistake a demand of twelve dollars instead of twelve hundred, and in the Court of Common Pleas he recovered a judgment for nearly twelve hundred dollars; from which judgment the defendant appealed, but neglected to enter his appeal; and upon the plaintiff's complaint to this Court for affirmation of the judgment, the Court refused to allow him to amend the record of the court below by inserting the word *hundred* after *twelve;* and also, inasmuch as the judgment was erroneous on the face of it, refused to affirm the judgment. *Varnum* v. *Bissell.* 191

See ATTACHMENT, 1, 2. BAIL, 1, 3.

ASSESSORS.

1. The *St.* 1823, *c.* 138, § 5, providing that assessors shall be responsible only for the want of integrity and fidelity, in the assessment of taxes upon the inhabitants of any "city, town, district, parish or religious society," does not apply to the assessment of a tax on the inhabitants of a school district. [Altered by Revised Stat. *c.* 7, § 44.] *Taft* v. *Wood.* 362

2. By *St.* 1826, *c.* 143, § 11, assessors are required to assess, *in the same manner as town taxes are assessed*, on the polls and estates of the inhabitants of school districts, all moneys voted to be raised by the inhabitants of such districts, for the erection of schoolhouses, &c.; and by the tax act, *St.* 1828, *c.* 143, § 3, they were required, in assessing taxes, to assess one sixth part of the whole sum to be raised, on the male polls, as nearly as could be conveniently done, provided that the whole amount of

Digitized by Google

poll taxes assessed in any one year on any individual, for any city, town and county purposes, highway taxes excepted, should not exceed the sum of $1·50. It was *held*, that this limitation of the poll tax to $1·50 did not apply in the case of the assessment of a school district tax made by virtue of these statutes, a school district tax being in its nature occasional, and not annual. [See Revised Stat. *c.* 7, § 27, and *c.* 23, § 37.] *Ibid.*

3. The *St.* 1826, *c* 143, § 11, [Revised Stat. *c.* 23, § 35,] requires assessors, before assessing any school district tax, to determine in which district the lands of persons residing out of the limits of the town shall be taxed, and to certify in writing their determination to the clerk of the town, who is to record the same; and where a school district tax was assessed, and the assessors neglected to comply with these provisions, it was *held*, that the assessment was invalid; and that an inhabitant of the district might avail himself of such defect. *Ibid.*

ASSIGNMENT.

1. Where an insolvent debtor assigns his property to a trustee for the benefit of his creditors who shall execute the indenture of assignment and thereby release their demands, a creditor may execute it upon a condition precedent; which, if not performed, will render such execution inoperative. *American Bank* v. *Doolittle.* 123

2. Where a creditor executed the deed of assignment, on condition that the property assigned was not then attached by any valid trustee process, it was *held*, that a trustee process served upon the assignee as trustee, in which there was a misnomer as to his Christian name, was nevertheless a valid trustee process, and consequently that the signature of the creditor was inoperative. *Ibid*

3. In an action by the creditor who thus executed the deed of assignment, against a co-promisor of the debtor, it was *held*, that the officer's return in the trustee suit, which stated that the person named in the writ as trustee was not to be found, but made no mention of any service on the assignee as trustee, was not conclusive, and that parol evidence was admissible on the part of the creditor, to prove that the writ had been served on the assignee. *Ibid.*

4. In an action upon a promissory note it appeared, that the defendant had assigned his property in trust to pay the note in suit, after certain other debts should be paid; that there was no express stipulation in the assignment, on the part of the creditors; that the plaintiff assented to the assignment and claimed the benefit of it, but that it was not executed by him; and that no part of the proceeds had been received by him. It was *held*, that these facts did not constitute a bar to the action; but that the Court might, in its discretion, grant a delay of judgment, to give reasonable time for the property to be converted into money and applied according to the provisions of the assignment. *Rice* v. *Catlin.* 221

ASSUMPSIT.

1 By a written agreement the defendant was to carry on the plaintiff's farm, and was to have for his labor one half of the produce; the plaintiff was to furnish him with all seeds necessary to sow, and the defendant was to pay the plaintiff for one half of the seeds sown, or return one half after harvest, at the defendant's option; and the plaintiff was to furnish the defendant with grain, until he could harvest the crops, and was to receive

Digitized by Google

the same quantity at harvest, or the value in money. The plaintiff furnished a parcel of rye and a parcel of oats, a part of which was sown and the residue used by the defendant; also a quantity of hay; and the defendant raised a quantity of oats on the plaintiff's farm, and sold them. In indebitatus assumpsit brought while the special contract was in force, it was *held*, that the plaintiff could not recover for the rye and the first parcel of oats, because they were embraced by the special contract and the defendant had a right to pay for them in kind; but that he could recover for the hay, because it was not included in the special contract, and for half of the last parcel of oats, because by the sale the defendant had put it out of his power to deliver them in kind. *Shearer* v. *Jewett*. 232

2. H. C. and G. C. signed a subscription paper, by the terms of which they each agreed to pay the defendant the sums written against their names, provided he would cause an institution for the education of teachers for schools, to be established in the town where the subscribers lived. A few days afterwards the whole amount of their subscriptions was paid to the defendant, he giving a receipt therefor, which set forth, that the money was "received of H. and G. C. in payment of a subscription by them made to encourage the establishment of a seminary" &c. It was *held*, that as no time was fixed by the subscription paper within which the institution was to be established, it should have been established within a reasonable time; and that, as it was not so established, assumpsit for money had and received might be maintained against the defendant to ecover back the amount paid to him *Carter* v. *Carter*. 424

3 It was *held* also, that the subscriptions of H. C. and G. C. were several, and consequently that they should bring several actions to recover back the money paid by them. *Ibid.*

See MORTGAGE, 15, 16.

ATTACHMENT.

1. Where an officer, immediately upon receiving a writ with directions to attach certain real estate of the debtor, made a memorandum upon the writ that he attached accordingly, stating the day and month, but afterwards by mistake returned that he attached on the same day of the succeeding month, and in the Court of Common Pleas, at the return term, upon leave to amend, he corrected the error, it was *held*, that the amendment was properly allowed, the memorandum being something to amend by. *Haven* v. *Snow*. 28

2. It was also *held*, that the amendment was effective as against another creditor who attached the same real estate between the days mentioned in the memorandum and in the return, such creditor having constructive notice of the first attachment. *Ibid.*

3. The same attorney having commenced both actions and directed the order of the attachments, notice to him of the first attachment was *held* to be notice to the subsequently attaching creditor. *Ibid.*

4. The nature of the possession and custody which an officer is to keep, of personal property attached by him, depends upon the nature and position of the property; and in general, it must be such a custody as will enable him to assert his control over the property, and so that it cannot probably be withdrawn or taken by another without his knowledge. *Hemmenway* v. *Wheeler*. 408

5. An officer attached a parcel of hewn stones lying in the town of

Digitized by Google.

Worcester, on land belonging to the commonwealth, by going among and upon them, and directed the creditor, who had receipted for them, and whose place of business was about fifty or sixty rods distant from where the stones lay, and in sight of a part of them, to take charge thereof; but the stones were not removed. No notice was given to any one, of the attachment, although there were persons at work or residing near, nor was any other mode adopted of giving notoriety to the transaction. A few days after the attachment, a person was summoned as a trustee in the same writ, and the creditor informed him of the attachment, but desired him not to inform any other person thereof, saying that he did not wish to injure the credit of the debtor. It was *held*, that the attachment was valid as against a subsequent attachment made without notice thereof, and that sufficient possession was retained, to continue it in force. *Ibid.*

6. Where land is attached simultaneously by two creditors, and is duly levied on under their respective executions, they are each entitled to a moiety of the land, without regard to the relative amounts of such executions; but if such moiety is more than sufficient to satisfy the execution of one of the creditors, the surplus will go to the other creditor. *Sigourney* v. *Eaton.* 414

7. So, where an equity of redemption is attached simultaneously by two creditors, and sold under their executions, the proceeds are to be divided equally between them, subject to the same restriction. *Ibid.*

8. *It seems*, that where land is simultaneously attached by two creditors, and executions are issued in their favor respectively, the officer levying under one of such executions may return, that in consequence of such simultaneous attachment, the execution was satisfied only to the amount of one half of the appraised value of the land. *Ibid.*

See LIEN, 5, 6.
PLEDGE, 1.
SALE, 2.

ATTORNEY AT LAW

See COSTS.

AVERAGE.

1. Where the master of a vessel, which was dragging her anchors towards the shore, cut away the masts to prevent her drifting and thereupon she brought up, but after about an hour she drifted again and was wrecked, it was *held*, that the cargo which was saved, was not liable in general average, inasmuch as the sacrifice of the masts did not rescue it from the particular peril then impending. *Scudder* v. *Bradford.* 13

2. In adjusting a general average in the case of a jettison, if the vessel arrives at the port of destination, the value of the goods thrown overboard is the net price for which they might have been sold at the port. *Tudor* v. *Macomber.* 34

3. But if the vessel returns to the port of departure or a neighbouring port, the actual price of replacing the goods thrown overboard, or if that cannot be done, the cost price, including shipping charges, is the rule by which the value of the goods jettisoned should be ascertained. *Ibid.*

4. As a general rule, the valuation of the cargo in the bill of lading is conclusive between the owner of the ship and the owner of the cargo, in the adjustment of a general average at the home port. *Ibid.*

5. Where the cargo jettisoned consisted of ice, which had no market

Digitized by Google

val ie at the port of departure, but in the bill of lading (there being no invoice) was valued at a certain sum, and the vessel returned to her port of departure, it was *held*, that in adjusting the general average at that port the sum in the bill of lading was to be taken to be the value as between the shipper and the ship-owner; and that as no freight was earned, the contribution was to be made by the ship and cargo alone. *Ibid.*

BAIL.

1. Where, during the pendency of an action in court, the declaration was amended, it was *held*, that such amendment, although it embraced a new demand, would not discharge the bail, if judgment was rendered on the original demand only; for the bail are liable only to the extent of the original demand, and cannot therefore be injured by the amendment. *Seeley* v. *Brown.* 177
2. In an action by a judgment creditor against the sheriff for not delivering over the bail-bond taken in the original action, the judgment debtor having avoided on the execution, the sheriff will not be allowed to give in evidence, in mitigation of damages, that the judgment debtor has been insolvent from the time of the rendition of the judgment against him. *Ibid.*
3. In indebitatus assumpsit on a promise made to L and H, the defendant was attached to answer to "L and H *and one R deceased*, copartners doing business under the firm of R, L and H," and the declaration alleged a promise to pay "L and H, *the surviving partners of the said firm of R, L and H.*" It was *held*, that the bail were not discharged by an amendment by which the words above italicized were struck out of the writ and declaration. *Lord* v. *Clark.* 223

BILL OF EXCHANGE AND PROMISSORY NOTE.

1. A person holding a promissory note as a trustee, may bring an action upon it in his own name; but a person holding a note as a mere depositary and agent, must bring an action upon it in the name of his principal. *Sherwood* v. *Roys.* 172
2. The donor's own promissory note, payable to the donee, cannot be the subject of a *donatio causâ mortis*. *Parish* v. *Stone.* 198
3. Where a promissory note is given upon two distinct and independent considerations, and one is a consideration which the law deems valid and sufficient to support a contract, and the other not, the note will be apportioned as between the original parties, or such as have the same relative rights, and the holder will recover to the extent of the valid consideration, and no further; and where the parts of the note are not respectively liquidated and definite, the question, what amount was founded on one consideration and what on the other, is to be settled by the jury, upon the evidence. *Ibid.*
4. Where the purchaser of a patent right gave therefor his promissory note, and the patent proved to be void, the note was held to be entirely without consideration, notwithstanding the vendor covenanted that he had good right to sell and convey the patented privileges, and that he would warrant the same against the claims of all persons. *Dickinson* v. *Hall.* 217
5. A promissory note given for a void patent right, is without consideration, notwithstanding the vendor believed at the time of the sale, that the patent was valid *Ibid.*
6. A negotiable note payable to three payees may be legally transferred by an indorsement by two of them

Digitized by Google

to the third payee and a stranger; and if this were doubtful, the further indorsement by the third payee to the stranger will clearly pass the property to him. *Goddard* v. *Lyman*. 268

7. The maker of a negotiable note appearing, on the face of it, to have been given in consideration of the transfer of a patent right which proved to be of no value, cannot set up this want of consideration as a defence to an action by a *bonâ fide* indorsee. *Ibid.*

8. The facts, that a negotiable note appears on the face of it to have been given for a patent right, and that it has been indorsed to be at the risk and cost of the indorsee, will not authorize a jury to infer that the indorsee had any knowledge or reason to suspect that the patent right was of no value and the note without consideration. *Ibid.*

9. Where a person *non compos mentis* under guardianship, had in his possession a promissory note payable to himself, and received payment of it from the promisor, who had knowledge of the guardianship, it was *held*, that such payment was of no effect; and the letter of guardianship was *held* to be conclusive evidence, that at the time of the payment the ward was not of sound mind *Leonard* v. *Leonard*. 280

10. Where a note made by fourteen promisors was taken up by four of them, who gave in satisfaction thereof their own joint and several negotiable note, it was *held* that this was such a payment as would enable the four to maintain an action for contribution against a co-promisor in the first note. *Chandler* v. *Brainard*. 285

11. The new note having been received on the joint credit of the four, it was *held* that they ought to join in an action for contribution. *Ibid.*

12. In an action on a promissory note given for the purchase-money of land conveyed by deed with covenants of seisin and warranty, the action being between the original parties, it is competent for the defendant to prove, by way of defence, a total failure of title to the land. *Rice* v. *Goddard*. 293

13. Where the note was assigned by the payee after it had become due, and the maker expressly promised the assignee to pay it, and afterwards the title to the land entirely failed, it was *held* that the assignee could not enforce payment of the note against the maker. *Ibid.*

14. A negotiable note was made to the plaintiff by the defendant, who held a note made by the plaintiff but had it not with him at the time, and it was agreed that the two notes should be set off, one against the other, so far as the smaller would pay the larger. It was *held*, that this agreement was executory and therefore was not an extinguishment of the smaller note. *Cary* v *Bancroft*. 315

15. The defendant being employed by the heirs of a deceased person, to collect the debts due to the estate of the deceased, one of the heirs, who was insolvent, drew an order for value received, requesting the defendant to pay to the plaintiff whatever balance might come into the defendant's hands for account of the drawer, out of the estate of the deceased, and the defendant "accepted to pay the balance when received." In an action by the plaintiff upon the order, it was *held*, that the defendant had no right to retain a part of the money received, in discharge of any claim which he had against the drawer, beyond the expenses of collecting the money; and that whether the plaintiff, when he received the order, did or did not know of a claim set up by the defendant, which was discovered

Digitized by Google

after the acceptance, was immaterial. *Taft* v. *Aylwin.* 336

See LIMITATIONS, STATUTE OF, 3.
TENDER.
WITNESS, 2.

BOND.

See ESCAPE, 1.

BOSTON.

See PILOT, 1, 2

CHARITY.

1 In 1657, Edward Hopkins, of England, devised estate, real and personal, to certain individuals, in full assurance of their trust and faithfulness in disposing of the same according to the true intent and purpose of the testator, namely, "to give some encouragement to those foreign plantations [New England] in breeding up of hopeful youth in a way of learning, both at the grammar school and college, for the public service of the country in future times." In 1664 the trustees executed an instrument under seal, by which they order, that "the property be equally divided between the towns of New Haven and Hadley, to be in each of those towns respectively managed and improved towards the erecting and maintaining of a grammar school in each of them, and the management thereof to be in the hands of our assigns, which are for that at New Haven, &c., and for that at Hadley, J. R., &c. These we constitute to be our trustees for the ordering of said estate and carrying on the work, wherein it is to be employed, in their town, hereby committing to them and investing them with full power to act in the same, in all respects, as ourselves, both in managing the trust themselves, and in choosing successors from time to time, &c., who &c. shall have full power to pursue and put in execution the pious end and intention of the worthy donor, yet reserving to ourselves while we live, the full power of a negative vote, for the hinder ing any thing that may cross that end." In 1664 another testator devised land "to the town of Hadley, for promoting and advancement of a school for learning." In the same year another testator devised "to the town of Hadley" certain real estate "to be improved towards the maintaining of a school ever." In 1666 the town passed the following vote: "The town have granted to and for the use of a grammar school in this town of Hadley, and to be and remain perpetually to and for the use of the said school," certain land specified in the vote. In 1669 one of the surviving trustees made a proposal to the town of Hadley, that he should appoint three persons, to be submitted to the town and to be approved of by them, and that the town should appoint two, and that these five, with himself whilst he lived, should have the sole disposal and management of the estate, in all respects, for the end to which it was bequeathed; and that the same five persons, with himself whilst he lived, should have the sole management of all other estate given by any donor, or which might be given while they survived, to the town of Hadley, for the promoting of literature or learning; that these trustees should have power to perpetuate the board by filling their own vacancies; and that the school should be called the Hopkins school. The town approved of three persons named by the trustee, and appointed two themselves, and voted that "the committee thus chosen should jointly and together have the ordering and full disposal of the estate given by the

Digitized by Google

trustees of Hopkins to the town of Hadley, or any other estate or estates that were or might be given, either by the town itself or by any other donor, for the use, benefit and maintenence and promoting a grammar school to and for the use and in the town of Hadley." In 1675 another testator devised land to the town of Hadley, committing it to the care, disposing and ordering of S. S. &c. [naming the persons constituting the Hopkins school committee] to be by them disposed of (in case they quietly keep and remain in their committeeship for Hopkins school) unto Hopkins school, for Hadley; but if they be put out or disturbed in that committeeship, then to be disposed of as they see meet, for the good of the town." It was *held*, that the legal estate in the property given by Hopkins, did not, by his will and the instrument made by his trustees in 1664, vest in the town of Hadley; that the devise was not made for the purpose of founding a common town school for the exclusive benefit of the inhabitants of that town, but was designed for the encouragement of all persons in that (then) newly settled part of the country, who should desire to avail themselves of the benefit of a grammar school adapted to instruct and qualify pupils for the university; that a long-continued usage of admitting pupils from other towns than Hadley, to participate in the benefits of the Hopkins school, was of weight in establishing such construction of the devise; and that all the other donations above mentioned were to be held upon the same trusts and be appropriated to the same purposes, as the principal one from Hopkins. *Hadley* v. *Hopkins Academy*. 241

2. It is probable, that in 1686 the county courts and the president and council of New England had jurisdiction over trusts of the kind above described. *Ibid.*

CONSIDERATION.

See BILL OF EXCHANGE &c. 3, 4, 5, 7, 8, 12, 13.
CONTRACT, 3, 4.
PRINCIPAL AND SURETY, 1.

CONTRIBUTION.

See BILL OF EXCHANGE &c., 10, 11.

CONTRACT.

1. Where two persons are claiming title to personal property adversely to each other, and one of them calls upon a third to assist in removing it, and the assistant has reasonable grounds to believe that his employer is the owner of the property, a promise of indemnity to the assistant is valid in law, although it subsequently turns out that the title of the employer was not good, and the act of removal was a trespass. *Avery* v. *Halsey*. 174
2. Notice of the true owner's claim to the property, given by him to such assistant while the title was in dispute, was *held* not to be conclusive evidence that the assistant knew that the property was not in his employer. *Ibid.*
3. An express promise of indemnity being made to such assistant by one who claimed no interest in the property, and such assistant having acted on the faith of it, it was *held* that the danger incurred was a valid consideration, and that an action on the promise might be maintained. *Ibid.*
4. A contract to pay money, made upon no other consideration than that of equalizing the distribution of the promisor's estate after his decease, is without a sufficient legal consideration, and therefore

Digitized by Google

cannot support an action or found a legal claim. *Parish* v. *Stone*. 198

See ASSUMPSIT, 1.
BILL OF EXCHANGE &c., 14.
PARTNER, 2.
PLEADING, 1.
PLEDGE, 1.
TRUSTEE PROCESS

CONVEYANCE.

1. In an action for a breach of the covenants of seisin and right to convey, contained in a deed of certain land from the defendant to the plaintiff, dated May 22, 1811, it appeared that the defendant had conveyed the same land to the plaintiff by a prior deed, which contained the following clause: — "By this deed I mean to convey all the lands lying &c., of which A. S. died the owner, and which I claim by virtue of his last will and testament, being all the lands I own in the State of New York." On this deed was endorsed an unacknowledged deed of the plaintiff, dated June 5, 1811, which was as follows: — "Whereas the defendant has executed another deed of the same premises, to be delivered to me upon the assignment of this conveyance to him, I do therefore, in consideration thereof, reassign and convey to the defendant and his heirs, the within-described premises." It was *held*, that the plaintiff was not estopped by his deed to deny the defendant's seisin and right to convey. *Smith* v. *Strong*. 128

2. A grantor conveyed a large number of lots of land, described as lying in a tract of wild land called the Boston Purchase. Among these lots were two described as "long lots numbered 15 and 43, containing 140 acres each, more or less," which were originally included in the surveys of the Boston Purchase, but which, it had been ascertained previously to the date of the deed, were adjoining thereto. It was *held*, that the words of the deed were sufficient to pass the two long lots; for the words of general description are controlled by the particular description. *Ibid.*

3. In an action brought in Massachusetts, upon a breach of the covenants of seisin and right to convey, where the land is situated in another State, the damages are to be assessed according to the rule adopted in Massachusetts. *Ibid.*

4. In such action the measure of damages is the consideration paid, with interest from the date of the deed; but if the consideration cannot be ascertained, the value of the land at the time of the intended conveyance, with interest from the date of the deed, will be the measure of damages. *Ibid.*

5. If the grantor in a deed containing covenants of seisin and warranty was disseised at the time of the execution of the deed, no action will lie against him on such covenants in the name of an assignee of the grantee; for, the covenant of seisin being broken at the time of the execution of the deed, a mere right of action accrued to the grantee, which was not assignable. *Bartholomew* v. *Candee*. 167

6. A deed of wild land executed and acknowledged by a grantor who had no right to the land, and duly recorded in the registry of deeds, and a mere entry by the grantee without an open exclusive occupation manifested by fencing or otherwise, do not amount to a disseisin, against the will of the true owner. *Bates* v. *Norcross*. 224

7. The registry of a deed of land executed and acknowledged by a grantor who had no right to the granted premises, is not constructive notice to the true owner that such conveyance has been made. *Ibid.*

Digitized by Google

3. The registry of a deed is constructive notice only to after-purchasers under the same grantor. *Ibid.*

9. A tract of land was conveyed by a deed which described it as bounding on a road, and stated the number of acres which it contained. Subsequently the road was discontinued, and a new road laid out, by which a small portion of the tract was separated from the residue. After the new road had been made, the demandant, to whom the tract had been conveyed, mortgaged a tract of land, the deed of mortgage defining the land by bounds, one of which was the road, without stating the length of the lines, and describing the land as the same land which was conveyed in the first mentioned deed and as containing the same number of acres, and referring to that deed for all further necessary description. It was *held*, that the small portion of land so separated by the location of the new road, did not pass by the mortgage deed. *Stearns* v. *Rice*. 411

10. L conveyed land, subject to incumbrances, to P, under a verbal (and therefore voidable) agreement on the part of P, that he would convey to L or to any other person at L's request. L afterwards applied to W and F for a loan upon a mortgage of the land, but they refused to make advances of money except upon an outright conveyance, and P and L and L's wife then joined in a quitclaim deed to W and F, who at the same time gave to L alone a bond to convey to him whenever within five years he should repay them all such sums as they should expend in discharging incumbrances and making improvements on the land; but there was no collateral promise on the part of L to repay such sums. It was *held*, that the deed and bond did not constitute a mortgage, but a sale with a right to repurchase upon condition. *Flagg* v. *Mann*. 467

11. L, not having complied with the condition within the five years, nor received a conveyance from W and F, gave a deed of quitclaim to the plaintiff and the defendant; and it was *held*, that the acceptance of the quitclaim did not estop either of the grantees, in a controversy between them, from alleging that nothing passed by the deed; and it was further *held*, that L had no interest in the land which could pass to the grantees and constitute them joint tenants or tenants in common, and consequently that one of them could not sustain a bill in equity against the other under *St* 1823, *c.* 140, giving remedies in equity between joint tenants and tenants in common. *Ibid.*

See BILL OF EXCHANGE &c., 12, 13. EQUITY, 1.

CONVICT.

See STATE PRISON, 1, 2, 3, 4.

CORPORATION

1. The equity jurisdiction given to this Court by *St.* 1823, *c.* 140, § 2 in disputes between partners, joint tenants and tenants in common, does not extend to cases between members of a manufacturing corporation. *Russell* v. *M'Lellan*. 63

2. It is not essential, in order that an act may take effect, incorporating individuals as a manufacturing corporation, that the records of the corporation should show a formal acceptance of the act, by the individuals incorporated. *Ibid.*

3. Nor is it essential to the proper organization of such a corporation, that its records should show that notice of the first meeting had been given. *Ibid*

4. A purchase by only two individ

Digitized by Google

dals, pursuant to an agreement between them, of all the shares in such a corporation, does not dissolve the corporation, nor do these individuals become partners, joint tenants or tenants in common, in consequence of such purchase. *Ibid.*

5. The circumstance that such a corporation has been without officers for more than two years, and its omission to do any corporate act during that period, do not make the members partners, joint tenants or tenants in common, nor operate as a dissolution of the corporation. *Ibid.*

6. Under *St.* 1808, *c.* 65, regulating manufacturing corporations, no action can be maintained by a manufacturing corporation, either against a stockholder or against his executor, to enforce the payment of assessments laid on his shares; and consequently such corporation cannot set off a claim for unpaid assessments, in an action against it by the executor of the stockholder, for a debt due to the stockholder. *Cutler* v. *Middlesex Factory Co.* 483

See PARISH, 3, 4, 5.

COSTS.

An attorney at law who attends court on account of professional business and also upon a subpœna as a witness, is not entitled to costs as a witness, except to a day's pay for attendance on the day on which he testifies; or if, after completing his own business, he is detained as a witness, to pay for attendance during the whole time of the detention; but if he comes to court solely as a witness, he then stands like other witnesses in regard to costs. *Parks* v. *Brewer.* 192

See EXECUTOR &c., 1.
INSOLVENT ESTATE, 3, 4, 5.

COUNTY COMMISSIONERS.

See WAY, 1.

COVENANT.

See BILL OF EXCHANGE &c., 4, 12.
CONVEYANCE, 3, 4, 5.
PLEADING, 5.

DAMAGES

See CONVEYANCE, 3, 4.
TAX, 3.

DEED.

See CONVEYANCE, 6, 7, 8.

DEPOSITION.

1. Where a deposition was taken by a justice of the peace who was the son-in-law of one of the parties in the action, but no fraud or partiality was alleged, it was *held* that the justice was not "interested in the event of the cause," within the meaning of *St.* 1797, *c.* 35, § 1, and that the deposition might be admitted in evidence. *Chandler* v. *Brainard.* 235

2. After a commission to take a deposition in another State has issued, with interrogatories filed on both sides, it is doubtful whether the party taking out the commission is at liberty to cause the deposition to be taken without reference to the commission. *Davis* v. *Allen* 313

3. But if this is allowable, he must prove, that he has elected to suppress the commission and take the deposition in the mode provided by statute, that he has given notice thereof to the other party, that the person taking the deposition was duly qualified, and that the other party had notice of the time and place of taking. *Ibid.*

4. A deposition taken under a commission is not admissible in evidence, unless it appear by the cer

Digitized by Google

tificate of the commissioner, that the interrogatories annexed to the commission were propounded to the deponent, and that the deposition was taken in pursuance of the commission. *Ibid.*

DEVISE.

1. A testator, after giving to his wife his mansion-house and the income of certain personal estate for her life, directed that, at her decease, the same should "be divided among his children, share and share alike, and to the heirs of their bodies respectively;" and that, if such income should not amount to $1000 annually, the deficiency should be made up from the personal estate. To his sisters and nephew he bequeathed small annuities, and to his sons the sum of $10,000 each. He also gave $10,000 to trustees, the income of which was to be paid over to his daughter C. during her life, "and at her decease the whole principal and interest to be divided equally among the heirs of her body, if any; and in default thereof, the same to go to her surviving brothers and sister in equal shares, and to their heirs for ever;" and in case she should be married before the youngest child of the testator arrived at full age, the executor was authorized to advance to her a sum not exceeding $2000, taking therefor her receipt on interest, the same to be deducted from her share in the division of the estate. The residuary clause of the will was as follows: "My will is, that as soon as my youngest child shall have arrived at full age, all the rest and residue of my estate, real and personal or mixed, after providing for the annuities to my two sisters and nephew, except such as is bequeathed to my said wife during her life, shall be divided into equal parts; one of which to go to each of my *said children, who shall be then living, and to the heirs of their bodies respectively for ever, and to none other.*" It was *held*, that the words "heirs of their bodies," in the residuary clause, were to be construed as words of limitation and not as words of purchase: that as they would have created an estate tail in real estate, the children were entitled to the residuary fund, which consisted of personal estate only, as their absolute property; and that, as no directions were given as to the investment or management of the residuary fund, and no designation of usufruct expressed, as distinct from an absolute gift to the children, the fund itself should be distributed among them, when the youngest child arrived at full age, subject to the charges for securing the income of the widow and the annuities. *Adams* v. *Cruft.* 16

2. A testator who held $20,138 in the three per cent. stock of the United States, made the following bequests: "I give and devise to my daughter M. S., at this time single, $600 per annum, to be regularly paid to her in quarterly payments out of my three per cent. stocks, during her life, and should she marry and have issue, then, at her decease, *the same* to go to her children and the children of B. H. equally."—"All the rest and residue of my estate, I give unto my grandchildren, the children of my daughters, M. S. and B. H., that is to say, to such of them as may be living at my decease, in equal portions." After the death of the testator, a large portion of the stock was paid off by the United States, and the fund in the hands of the executor thus became larger than was sufficient to raise the sum of $600 annually. It was *held*, that the words, *the same*, in the first clause, did not refer to the annuity, but to the stock, and there-

Digitized by Google

fore that the stock did not pass by virtue of the latter clause, to the residuary legatees, subject to the annuity; and that it was the intention of the testator, that the stock should remain in the hands of his executor during the life of M. S., and the annuity be paid over to her, and that at her decease, the stock itself should be distributed among all the grandchildren *who should be living at that time.* *Hancock* v. *Hancock.* 70

3 Devise: — "I give and devise to my wife the use and improvement of one third part of all my real and personal estate, during her natural life; and I give and devise the same at her decease to my children, their heirs and assigns." It was *held*, that this clause gave a contingent and joint interest in the personal estate, to those of the children who should be living at the death of the testator's widow. *Emerson* v. *Cutler.* 108

4 Devise: — "I give and bequeath all the rest, residue and remainder of my estate, real and personal, to my son and my daughters, to be equally divided between them; and to be distributed to them as they shall respectively arrive at the age of twenty-one years and not before, to hold to them, their heirs and assigns for ever; subject to the payment of the annuities aforesaid; and I do hereby authorize and empower my executors to receive the rents, income and interest of the residue of my estate, real and personal, hereby bequeathed to my children, and out of the same to pay the annuities aforesaid, and also appropriate and apply the whole of the remainder of said rents, income and interest, or such part as they shall judge necessary and proper, to the support and education of my children, until they respectively arrive at the age of twenty-one years." It was *held*, that the children took a vested estate in this residue immediately on the death of the testator, and that they took it as tenants in common and not as joint tenants. *Ibid.*

5. *Held* also, that the income of the real estate and the income of the personal estate must contribute proportionably to the payment of the annuities. *Ibid.*

6. A father executed his will, whereby he bequeathed to his daughter the sum of $268, to be paid to her *at her marriage*, in money or such articles of personal estate, at cash price, as she might choose. Upon the subsequent marriage of the daughter, the father furnished to her certain articles and money, to the amount of $147·49, and on the day of the marriage entered a charge thereof in a book of accounts; he afterwards paid her $50, and took a receipt therefor from her husband, as for part of her portion, and also paid an order for $20·60, drawn upon him by the husband, which order was found pinned to the leaf in the book upon which the account was entered, together with the receipt. The father, several years subsequent to these payments, executed a codicil, in which he bequeathed to his daughter $100, "in addition to what he had before given her." Repeated declarations were made by the father, both before and after the execution of the codicil, that he had paid off a portion of what he had bequeathed to his daughter. It was *held*, that the republication of the will by the execution of the codicil, did not rebut the presumption, that the advances and payments made by the father were intended as an ademption *pro tanto* of the legacy given in the will; and that the charge in the book, the receipt, and the order, were legal and sufficient evidence of such payments. *Paine* v. *Parsons.* 318

Digitized by Google

7. A bequest of a sum of money to be paid in three years from and after the testator's decease, is a vested legacy. *Goddard* v. *Johnson.* 352
8. A husband may sue in his own right, after the death of his wife, for a legacy accruing to the wife during the coverture. *Ibid.*
9. If a testator, after the making of his will, takes a bond and mortgage, and enters for condition broken, but dies before foreclosure, the heirs at law are not entitled to the mortgaged premises as real estate purchased subsequently to the making of the will, but the debt goes to the executor as personal estate, and he may collect it, or may assign it together with the mortgage. *Fay* v. *Cheney.* 399
10. Devise: "I give to my wife the improvement of one half of my real estate, while she remains my widow, and all my household furniture to be at her disposal. I give to my four sons all the remainder of my estate, both real and personal, to be equally divided between them, share and share alike. My will is, that my executors have one year to pay one half of the legacies, and the other half in two years after my decease and the decease of my wife." The testator sold his real estate and died leaving a widow. It was *held*, that one half of the legacies was payable in one year from the probate of the will, and the other half in two years after the death of the widow. *Parks* v. *Knowlton.* 432
11. Where a legatee, being the son of the testator, died in the testator's lifetime, leaving children, it was *held*, that all the children must join in an action for the recovery of the legacy. *Ibid.*
2. A testator bequeaths to his granddaughter J. C. L. a sum of money, to be paid to her when she arrives at twenty-one or is married; and directs that if she shall die under twenty-one *and* unmarried, the legacy shall be paid to his other granddaughters. J. C. L. died in the lifetime of the testator, unmarried, but *after* attaining twenty-one. It was *held*, that the other granddaughters took nothing under the bequest. *Carpenter* v. *Heard.* 449
13. In the case of a bequest to J. C. L. and the other granddaughters in like form, except that the conditional words were, "if J. C. L. shall die before she arrives at the age of twenty-one years *or* is married," it was *held*, that the other granddaughters took nothing under the bequest. *Ibid.*
14. The making of a codicil, duly attested to pass real estate, and referring to the will, is a republication of the will, so as in effect to incorporate the codicil with the will, and give to such combined instrument the same effect as if executed at the date of the codicil. *Haven* v. *Foster.* 534
15. A testator, by his will, gives one half of all his estate to his brother John for life, and the other half, together with the remainder of the first half, in equal shares and in fee simple to all the children of his brother Andrew and his sister respectively, with survivorship if any of them shall die in minority. He afterwards purchases other lands, and then makes a codicil, which he directs to be annexed to the will and to be considered and taken as part thereof, and in which he revokes and annuls every bequest and devise made by the will to the children of his sister, and gives all and every part of his estate, of whatever description, which is in the will in any way given to the children of his sister, to the children of his brother Andrew, and ratifies and confirms the will in every thing except where it is revoked and altered by the codicil. It was *held*, that the will was re-

Digitized by Google

published by the codicil; that it contained words sufficient to embrace all the testator's estate held at the time of making the codicil, and of course no part of the property descended as intestate estate; that the clause of revocation in the codicil extended to the after-purchased land; and that the portion of the estate, including the after-purchased land, which but for the clause of revocation would have gone to the children of the testator's sister, was, by the codicil, devised to the children of Andrew. *Ibid.*

See CHARITY, 1.
HUSBAND AND WIFE, 1, 2.

DOMICILE.

See MARRIAGE AND DIVORCE, 2.

DONATIO CAUSA MORTIS.

See BILL OF EXCHANGE &c., 2.

DOWER.

See EXECUTOR &c., 3.
MORTGAGE, 1, 2, 3, 4.

EMBLEMENTS.

1. If a party in possession of land under a judgment in a writ of entry, sows the land during the pendency of a writ of right against him, and the demandant in the writ of right recovers judgment, and obtains seisin and possession before the crop is severed, the demandant is entitled to the crop. *King* v. *Fowler*. 238
2. So if the land is thus sowed by the grantee of the party who recovered in the writ of entry, and the recovery in the writ of right is against such grantee. *Ibid.*

EQUITY.

1. Land was conveyed to one in trust for others, who paid or became obligated to pay the purchase money. The trustee died, and his estate was represented to be insolvent, and commissioners of insolvency were appointed thereon. Upon a bill in equity against the administrator and heirs of the trustee, praying that the land might be conveyed by them to the cestui que trusts, a conveyance was decreed accordingly. *Root* v. *Blake*. 271
2. The *St.* 1783, *c.* 32, § 4, which authorizes the court to grant license to executors or administrators to convey real estate in pursuance of contracts made by the deceased, was not modified or in any respect annulled by the *St.* 1784, *c.* 2, providing for the distribution of insolvent estates; and upon a bill in equity by an obligee in a bond for the conveyance of land, brought against the administrator of the obligor, whose estate was represented to be insolvent, it was decreed that the administrator should convey to the obligee. *Ibid.*

See CONVEYANCE, 11.
CORPORATION, 1.

ERROR.

See AMENDMENT.

ESCAPE.

1. If a debtor imprisoned on execution is admitted to the liberties of the yard upon giving a bond with a surety approved by only one justice of the peace, the gaoler is liable for an escape; for the bond is not conformable to the statutes of 1784, *c.* 41, § 8, and 1811, *c.* 167, § 1, unless the surety is approved by the creditor or by two justices of the peace. *Whitehead* v. *Varnum*. 523
2. In an action of debt for an escape, it was *held*, that the plaintiff was entitled to interest from the date

Digitized by Google

of the writ, and not from the time of the escape. *Ibid.*

ESTOPPEL.

See CONVEYANCE, 1, 11.
PRINCIPAL AND SURETY, 2

EVIDENCE

1. The books of account of a person deceased, although verified by the oath of a witness, are incompetent to prove cash charges exceeding forty shillings in amount. *Burns* v. *Fay.* 8

2 In assumpsit for goods sold and delivered, an account of which was annexed to the writ, the defendant pleaded in bar a former judgment recovered by the plaintiff against him upon a writ containing, among other counts, a general count for goods sold and delivered, which might have embraced the claim which was the subject of the subsequent action. It was *held*, that the record of the former judgment was only *primâ facie* evidence of a prior adjudication of such claim; and that evidence *aliunde* was admissible to prove that such claim had not been considered and determined in the prior action. *Bridge* v. *Gray.* 55

3. Where a survey of land was made in pursuance of a resolve of the legislature of New York, and the plan was deposited in the office of the secretary of state, it was *held*, that a copy of the plan, verified by the oath of the surveyor, was competent evidence. But it seems that the original plan itself would not have been competent evidence, unless it had been thus verified. *Smith* v. *Strong.* 128

4. So, a copy of a plan, alleged to have been filed in the office of the secretary of state of New-York, by the persons under whom the party offering it in evidence claimed title which was not verified by the surveyor's oath, was *held* incompetent evidence. *Ibid.*

5. Where an attorney at law was requested by a debtor to draw up a mortgage deed of his personal property, and the debtor disclosed his purposes in making such a conveyance, either without any particular motive, or in order to remove any scruple that the attorney might have entertained as to the character of the transaction, but no legal advice as to the effect of such conveyance was asked or given, it was *held*, that the testimony of the attorney as to such communications, was admissible. *Hatton* v. *Robinson.* 416

6. The attorney, in such case, having drawn up the deed, by which the property was conveyed to a third person to prevent it from being attached by creditors, the deed was executed in the office of the attorney and in his presence; it was *held*, that the attorney was not exempted from testifying as to communications made to him by such third person. *Ibid*

7. Where, upon the trial of an indictment for adultery, one act of adultery committed by the defendant with the woman named in the indictment, was proved by the testimony of a witness whose credibility the defendant attempted to impeach, it was *held*, that other instances of improper familiarity between the defendant and the same woman not long before the act of adultery proved as above mentioned, might be given in evidence to corroborate the testimony of the witness. *Commonwealth* v. *Merriam.* 518

See ASSIGNMENT, 3.
BAIL, 2.
BILL OF EXCHANGE &c., 8, 9
CONTRACT, 2.
DEPOSITION, 1, 2, 3, 4.
DEVISE, 6.
INSOLVENT ESTATE, 2

Digitized by Google

LIEN, 7.
MORTGAGE, 14.
NEW TRIAL, 1.
PARISH, 5.
PARTNER, 1.
PLEADING, 6.
PLEDGE, 1, 3
SALE, 1, 5.
WITNESS, 1, 2.

EXCEPTIONS.

Where, upon an indictment in the Court of Common Pleas, the defendant was found guilty, and the cause was brought before this Court upon exceptions taken by the defendant in pursuance of *St.* 1832, *c.* 130, § 5, it was *held*, that no other questions could be considered in this Court than those reserved by the bill of exceptions. *Commonwealth* v. *Stephens.* 370

EXECUTION.

See ATTACHMENT, 6, 7, 8.

EXECUTOR AND ADMINISTRATOR.

1. Where a bill in equity brought by the administrator and heirs of an intestate to recover land devised to him, was discontinued, and an execution against them for the costs was paid by a stranger, and not by the administrator nor at his request, it was *held*, that a charge for such costs in the administrator's account, was properly disallowed by the judge of probate. *Jennison* v. *Hapgood.* 345
2. Where an executor sold the real estate of the testator and purchased it himself, and the heirs of the devisee, whose estate was insolvent, affirmed the sale, and in consequence the proceeds and interest thereon were paid to the administrator of the devisee, it was *held*, that the proceeds were to be treated as personal estate from the time of the sale, and that the heirs therefore had no right to the interest as a substitute for the rents and profits of the real estate, but that the devisee's creditors were entitled as well to the interest as to the principal. *Ibid.*
3. Where a testator, having mortgaged his real estate, devised it to his son, who died leaving a widow, and the executor sold the equity of redemption and purchased it himself and redeemed the mortgage, paying one half of it with assets in his hands, as executor, as directed in the will, and the other half with his own money, and the heirs and widow of the son elected to affirm the sale, it was *held*, that the widow was entitled, on account of her right of dower, to the interest during her life on one third of the sum for which the equity of redemption was sold, and on one third of the amount paid out of the testator's estate towards extinguishing the mortgage. *Ibid*
4. It is not competent for a court of probate to decide, that an account of an executor is final, so as to bar all further inquiry in regard to matters not included in the account, and to oust the court of probate of its jurisdiction. *Field* v. *Hitchcock.* 405
5. An executor is not liable to be called to account a second time, for the same matter; but, in order to protect himself from future liability, he should specify the subjects in regard to which he settles an account, and the decree of the court upon such specific subjects, will be conclusive against all parties, unless fraud be charged and proved. *Ibid.*

See EQUITY, 2.
INSOLVENT ESTATE, 1, 2, 3, 4, 5

FENCE.

Where in pursuance of the provisions of *St.* 1785, *c.* 52. regulating

Digitized by Google

the erection of fences, the plaintiff had, in consequence of the neglect of the defendant, erected the portion of the fence between their lands, which was assigned to the defendant by the fence viewers, and the fence viewers, afterwards, upon the application of the plaintiff, *but without notice to the defendant*, appraised the value of this portion and ascertained the amount of their fees, it was *held*, in an action brought by the plaintiff under the statute to recover double the amount of such valuation, &c., that such appraisement was void as against the defendant, although the statute does not expressly require notice thereof to be given to the defendant. *Scott v. Dickinson.* 276

See GENERAL FIELD, 2.

FRAUD.

See PLEADING, 6.
PLEDGE, 3.
SALE, 5.

GENERAL FIELD.

It seems that land which has lain in a common field *de facto* for a series of years, cannot be excluded therefrom merely by an allotment made in pursuance of a vote of the proprietors of the general field. *Scott* v. *Dickinson.* 276

It seems also, that under *St.* 1785, *c.* 52, the proprietors of a common field, in their corporate capacity, or as tenants in common, and not the individual proprietors holding portions of the common field in severalty, are liable, so far as regards the owner of lands adjoining the common field, to the duty of maintaining the partition fence between such portions of the common field and such adjoining land. *Ibid.*

GUARANTY.

Assumpsit on the following writing, signed by the defendant and addressed to the plaintiff: "July 4, 1818. Sir, My son F wishes to have you lend him about $180. If you will let him have it, when you find his security not good, please to notify me, and I will account to you for the same." About July 4, 1818, the plaintiff lent to F $188, and received his promissory note payable on demand with interest. On January 12, 1829, F failed, and mortgaged his property to the defendant, to secure a demand due to him from F. Subsequently the defendant, without receiving any portion of his demand, released the property for the benefit of the other creditors of F. The interest on the promissory note was paid until 1830, when a part of the principal was paid and a new note was given by F for the balance. On December 4, 1832, the plaintiff notified to the defendant, that the security of F was not good, and requested him to pay the amount remaining due on the new note; the plaintiff having never given notice to the defendant of the existence of this debt, previously to that time. It was *held*, that the defendant was discharged from his liability on the writing signed by him. *Thomas* v. *Davis.* 353

GUARDIAN.

See PRINCIPAL AND SURETY, 1.

HIGHWAY.

See HUSBAND AND WIFE, 2.
WAY, 1, 2.

HOPKINS ACADEMY.

See CHARITY, 1.

HUSBAND AND WIFE.

1. Where real estate devised to a female infant was sold pursuant to a license of court, and she after-

Digitized by Google

wards married and died under age, it was *held*, that the proceeds of the real estate were personal estate, and consequently that her husband was entitled to the same. *Emerson* v. *Cutler*. 108

2. So of damages paid for land of such infant taken for public use as a highway. *Ibid.*

See DEVISE, 8.
MARRIAGE AND DIVORCE, 1, 2.

INDICTMENT.

1 Upon an indictment under *St.* 1820, *c.* 45, [Revised Stat. *c.* 35, § 8,] for peddling jewelry, it was *held*, that plain gold ear-rings and knobs were comprehended in the signification of the term "jewelry," as it is used in the statute. *Commonwealth* v. *Stephens*. 370

2 A party indicted for a capital offence is entitled, as a matter of right, to a list of the witnesses examined as to his case before the grand jury. *Commonwealth* v. *Locke*. 485

See SALE, 1.

INFANT.

Under the *St.* 1784, *c.* 72, § 11, which provides that every master of a ship that shall carry or transport out of this government an infant, &c., without the consent of his parent, &c., shall be liable for the damages sustained by the parent, &c., in a special action of the case, no action can be maintained by the infant's mother and step-father, for they have no legal right to the minor's society or services. *Worcester* v. *Marchant*. 510

INSOLVENT ESTATE.

1. Where the administrator of an insolvent estate gives notice of his dissatisfaction with the claim awarded by the commissioners to a creditor of the estate, according to the provisions of *St.* 1784, *c.* 2, and the creditor, in consequence, brings his action at law, the creditor is not precluded from recovering a larger sum than was allowed by the commissioners, although he may not have given notice of his intention to have his claim determined at common law. *Burns* v *Fay*. 8

2. In such action, the report of the commissioners allowing a set-off against the claim of the plaintiff was *held* not to be competent evidence to prove the set-off. *Ibid.*

3. Where the administrator of an insolvent estate gives notice of his dissatisfaction with the sum awarded to a creditor, by the commissioners, and the creditor recovers a larger sum than was allowed by the commissioners, the creditor is entitled to an execution for the costs of the action, against the administrator, *de bonis propriis* ; but if the administrator had sufficient reason for his appeal, the judge of probate may allow the costs to be charged in the administration account. *Ibid.*

4. *It seems*, that in all cases, where a creditor recovers at common law, a larger sum than was allowed him by the commissioners of the insolvent estate, judgment for costs should be rendered against the administrator *de bonis propriis*. *Ibid.*

5. Where a claim presented to the commissioners of an insolvent estate is rejected, and the creditor recovers in an action at law against the administrator, brought in pursuance of *St.* 1784, *c.* 2, he is entitled to an execution for the costs of the action, against the administrator, *de bonis propriis* ; but the judge of probate may allow the costs to be charged in the administration account, unless the administrator unreasonably objected to the claim. *Pierce* v. *Saxton*. 274

Digitized by Google

INSURANCE.

1. In adjusting a partial loss on a ship which has been repaired, the proceeds of the old materials not used in the repairs, are first to be deducted from the gross expenses of the repairs, and then the deduction of one third new for old is to be made from the balance. *Eager* v. *Atlas Insurance Co.* 141

2 A usage at a particular place to make the deduction of one third new for old from the gross amount of the expenses of repairs, cannot control the above-stated general principle of law, in the construction of a policy containing no reference to such usage. *Ibid.*

3. Such usage moreover is unreasonable and cannot be sustained, because it is opposed to an established rule of law, and to the essence of the contract of insurance, which is a contract of indemnity. *Ibid*

INTEREST.

See ESCAPE, 2
USURY, 1.

JEWELRY.

See INDICTMENT, 1.

JUDGMENT.

See EVIDENCE, 2.

JURISDICTION.

See CHARITY, 2
MARRIAGE AND DIVORCE, 1, 2.

JURY.

The service as a juror, which by *St.* 1824, *c.* 119, renders one ineligible to serve again within three years, is a service as a juror in some court; a service on a sheriff's jury does not render the juror thus ineligible *Brewer* v. *Tyringham.* 196

LANDLORD AND TENANT.

1. The defendants, being owners of a manufactory and of a pond above it, and having purchased of the plaintiff the right of drawing off the water from the pond, through his land, made a written contract with one B, by which B was to run the defendants' mill for one year, and to manufacture for them, at a specified price, cotton furnished by them, and to keep the mill in good running order at his own expense, except the main gearing, which was to be repaired by the defendants if necessary; and no rent was to be charged by the defendants, and they were not to be called upon for any expense unless the main gearing should fail or some injury should arise to the dam; and six or seven acres of land where the factory stood, with the factory houses, blacksmith shop, &c., were to be used by B. In an action against the defendants for an injury sustained by the plaintiff in consequence of B's letting off the water from the pond so rapidly as to overflow the plaintiff's land, it was *held*, that B was the lessee and not the servant of the defendants, and consequently that they were not responsible for the injury complained of. *Fiske* v. *Framingham Manufacturing Co.* 491

2. Where the defendant, having the title to certain land, gave the plaintiff a bond stating that the plaintiff was in possession of the land and was to keep possession, and was to pay the defendant a certain sum of money in one year from the date, and the condition of the bond was, that the defendant should deliver to the plaintiff a deed of the land after the plaintiff should have performed what on his part was to be done, and the plaintiff continued in possession after the expiration of the year without paying the

Digitized by Google

money, it was *held*, that he was not a tenant at will but merely a tenant at sufferance. *Sanders* v. *Richardson*. 522

See MORTGAGE, 15, 16.

LARCENY.

See STATE PRISON, 3.

LEGACY.

See DEVISE, 6, 7, 10, 11, 12, 13

LIEN

1. Upon a petition to the Court of Common Pleas, pursuant to *St.* 1819, *c.* 156, to enforce a supposed lien on land and on a building erected thereon, for labor and materials furnished under a contract for erecting the building, the owner of the land may come in and make answer to the petition, although he was not a party to the contract. *Thaxter* v. *Williams*. 49
2. A contract made by a mechanic with a person in possession of land as a mere intruder or as a tenant, to erect a building thereon, does not create a lien, under *St.* 1819, *c.* 156, on the land and the building erected in pursuance of such contract, as against the owner of the land. *Ibid.*
3. Where a mechanic, in pursuance of a contract made with a person having a covenant for the conveyance of land, furnished materials and erected a building on the land, and afterwards such covenantee received a deed of the land but at the same time mortgaged it to a third person who advanced the purchase-money, it was *held*, that as the covenantee had but an instantaneous seisin, no lien attached upon the land and building in favor of the mechanic for the labor and materials furnished by him. *Ibid.*
4. The manufacturer of goods has a lien for the price of manufacturing them. *Townsend* v. *Newell*. 332
5. Where goods in the possession of a party who had a lien on them were attached, and he receipted for them to the officer, under an agreement that he should continue to retain for his lien; and afterwards they were attached at his own suit, and he receipted for them, still asserting his lien, it was *held* that the lien was not discharged. *Ibid.*
6. These attachments having been made on writs against a person who was not the owner of the goods, and the general owner having brought replevin against the attaching officer, it was *held*, hat although the attachments were void and the defendant could not justify as an officer, he might nevertheless defend the detention of the goods as the servant of the party having the lien. *Ibid*
7. In such action of replevin the defendant was permitted to prove by parol evidence, that the goods were attached by him subject to the lien, although no mention of the lien was made in the receipts taken by him nor in his returns *Ibid*

See PLEDGE, 1, 2.

LIMITATIONS, STATUTE OF

1. A shopkeeper's account containing charges of articles sold to the defendants, some of them within six years before action brought, and also containing credits given more than six years before action brought, is not an account current or a mutual account, so as that the charges within the six years should draw the previous charges out of the operation of the statute of limitations. *Gold* v. *Whitcomb*. 188
2. The declaration by one of two defendants, when an account against them barred by the statute of limitations was presented to him, that he had paid enough of the other

Digitized by Google

defendant's debts, was *held* not to amount to a new promise. *Ibid.*

3. The payment of interest by the principal promisor in a joint and several promissory note, annually, from the time when the note was given, is sufficient to take the note out of the statute of limitations, as against the surety. [But see Reviser' Stat. c. 120, § 14, 17.] *Sigourney* v. *Drury.* 387

LOTTERY.

See SALE, 1

MARRIAGE AND DIVORCE.

1. A libel was filed by a wife for a divorce, on the ground of the desertion and cruel neglect of the husband; and it appeared, that the parties were married in the county of Berkshire, and after residing there for some years, took up their residence in the State of New York, where the alleged desertion and cruel neglect took place; that the wife thereupon returned into that county to live, and filed her libel there, but that at the time when it was filed, the husband retained his domicile in New York; and that such desertion and cruelty would be no ground of divorce by the laws of New York. The Court refused to decree a divorce *a mensâ et thoro*, on the ground that it had not jurisdiction of the case. *Harteau* v. *Harteau.* 181

2. The maxim, that the domicile of the wife follows that of the husband, will not be applied to oust the Court of its jurisdiction, in case of a libel by a wife for a divorce. *Semble.* *Ibid.*

MECHANIC'S LIEN.

See LIEN, 1, 2, 3.

MORTGAGE.

1. The widow of a mortgager is entitled to dower in the equity of redemption, notwithstanding that in the deed of mortgage she may have released her right of dower; and although she cannot maintain an action at law against the mortgagee or his assignee, yet if the mortgage is not foreclosed, a court of equity will interpose and allow her to redeem. *Eaton* v. *Simonds.* 98

2. The owner of land mortgaged it, and his wife released her right of dower; the equity of redemption was afterwards sold to the defendant on an execution issued against the mortgager, and the defendant having paid the amount due thereon to the mortgagee, claimed an assignment of the mortgage; but, the mortgagee declaring that an assignment would be unnecessary, the mortgage was discharged upon the margin of the record in the registry of deeds. It was *held*, that this discharge was an extinguishment of the mortgage, and not an equitable assignment; and that the widow was entitled to dower in the land free from the incumbrance of the mortgage. *Ibid.*

3. The owner of land mortgaged it, his wife releasing to the mortgagee her right of dower; and after condition broken the equity of redemption was sold to the defendant on an execution against the husband. The defendant entered immediately into possession, and afterwards he procured an assignment of the mortgage. He had continued in possession more than three years after the assignment, when the husband died, but no notice was ever given to the wife that he was in possession for condition broken. It was *held*, that the wife had a right to redeem, in order to be let in to her dower. *Ibid.*

4. It was also *held*, that the defendant was not chargeable with the rents and profits received during

Digitized by Google

the life of the husband, but that he must account for those received since his death; and that the allowance to the defendant, in the account, for repairs, must be limited to such as were made since the death of the husband. *Ibid.*

5. Upon a bill to redeem, it was *held*, that if the mortgagee actually occupied the estate himself, he is not to be allowed, as a compensation for his care of the estate, any commission on the rent with which he is charged by the master in chancery, in stating the account. *Ibid.*

6 On the breach of the condition of a mortgage, the estate of the mortgagee becomes absolute at law; and a mortgager cannot maintain trespass against the mortgagee after entry for condition broken, or against any one holding under his title, although the mortgage debt may have been paid. *Howe* v. *Lewis*. 329

7. Where the mortgager, having sold the land and taken in payment the note of the purchaser and agreed to extinguish the mortgage, delivered the note to the mortgagee, under an agreement that if paid (which was not done) the proceeds should be applied towards payment of the mortgage, and also deposited with the mortgagee the sum due on the mortgage, in order to stop the interest, but under an agreement that it should not be applied to the payment of the mortgage, and the mortgagee gave a receipt for the money and retained the mortgage deed and the collateral note, it was *held*, that this was not a payment of the mortgage. *Ibid.*

8 The executor of a mortgagee entered for condition broken, and leased the land; in an action of trespass brought against the lessee by the mortgager, the lessee justified under the lessor, without alleging in his plea, in what capacity the lessor held the estate. Adjudged that the plea was sufficient. *Ibid.*

9. The owner of land mortgaged it to V, in 1803, but continued in possession. In January 1810, he made a deed of the same land to A, and in March 1810, he made a deed of it to T. The mortgagee, in 1812, conveyed the land to T, by a deed of quitclaim, in the usual form, with a covenant of warranty against himself and any person claiming under him. It was *held*, that this conveyance to T, who had taken from the mortgager the second deed of the equity of redemption, did not operate as an extinguishment or merger of the mortgage, so as to give a priority to A, but that it operated as an assignment of the mortgage. *Hunt* v. *Hunt* 374

10. The erection of buildings on mortgaged premises, by the mortgager while remaining in possession, will not operate as a disseisin of the mortgagee, but will be regarded as improvements made to enhance the value of the equity of redemption. *Ibid.*

11. A mortgagee cannot be disseised by the mortgager. *Ibid.*

12. The demandant having purchased at a sale on execution the right in equity of redeeming a parcel of land, afterwards took an assignment of the mortgage, (which mortgage and assignment were duly recorded,) and then, before the mortgager's right to redeem from the sale on execution had expired, brought a writ of entry on the mortgage to recover possession of the land. It was *held*, that without an actual entry by the demandant or the mortgagee, the demandant had a seisin which would support the action. *Tuttle* v. *Brown*. 514

13. *Held* also, that the mortgage was not merged in consequence of the

Digitized by Google

demandant's having purchased the equity of redemption when sold on execution. *Ibid.*

14. *Held* also, that under the general issue, the tenant could not give in evidence the officer's deed to the demandant, of the equity of redemption. *Ibid.*

15. Where a mortgager of leasehold premises reserves in the mortgage a right to remain in possession until breach of the condition, and he holds over; the law will not imply an assumpsit to pay rent to the mortgagee during the time of holding over and previous to an entry by the mortgagee. *Mayo* v. *Fletcher.* 525

16. The title to the premises in such case after a tender of performance made subsequently to the breach of the condition, cannot be tried in an action of assumpsit for rent alleged to have accrued during such holding over. *Ibid.*

7. Such mortgagee, having never entered, cannot maintain trespass *quare clausum fregit* against a person entering and occupying by permission of the mortgager before condition broken and holding over after a breach. *Ibid.*

See ATTACHMENT, 7.
CONVEYANCE, 10.
DEVISE, 9.
EXECUTOR &c., 3
LIEN, 3.
SALE, 5.

NEGLIGENCE.

See ACTION ON THE CASE

NEW TRIAL.

1 In trespass *quare clausum* for filling up a trench dug by the plaintiff for the purpose of conducting water from a pond to his mill, the defendants pleaded in justification, that they had a right to erect a dam at the outlet of the pond, to raise the water there to any height they should see fit, and to draw off the water whenever they should see fit, for the use of their mill; wherefore they entered, &c.; to which the plaintiff replied, *de injuriâ*, &c. It was *held*, that evidence on the part of the defendants, that they had a right to a reasonable use of the water, and an instruction to the jury to that effect, would have been irrelevant to the issue joined, and therefore, the omission by the court to give such instruction was not a sufficient ground for granting the defendants a new trial. *Corbin* v *Brown.* 306

2. After a verdict for the plaintiff in an action of trespass *quare clausum*, an exception was taken to the plaintiff's evidence of title, on a ground, in regard to which no instructions were given to the jury. Such instructions were important, but they were not asked for by the defendant previously to the verdict. It was *held*, that the exception came too late; since, if it had been taken during the trial, the plaintiff would have had an opportunity to obviate the objection by further evidence. *Leach* v. *Woods.* 461

3. Where the defendant in a real action, had been in possession of the demanded premises for six years, but his counsel, in consequence of perturbation of mind occasioned by a dangerous illness occurring in his family during the course of the trial, neglected to make any claim for an allowance for betterments, and the plaintiffs recovered a verdict, the Court, in the exercise of its discretion and to effect the substantial ends of justice, decided to grant a new trial, or to suspend judgment, in order either that the defendant might, with the consent of the plaintiff, remove the betterments from the land, or that, at the election of the defendant, an auditor might be appointed to assess the

Digitized by Google

sum to be allowed the defendant for the improvements. *Cutler* v. *Rice.* 494

See PRACTICE, 1, 2.

NON COMPOS MENTIS.

See BILL OF EXCHANGE &c., 9.

NOTICE.

See ATTACHMENT, 3.
CONTRACT, 2.
CONVEYANCE, 7, 8.
FENCE.

OFFICER.

See ATTACHMENT, 1, 4, 5, 6, 7, 8.
ESCAPE, 1, 2.
PLEADING, 7, 8.

PARISH.

1. By a vote of the proprietors of a township, a lot of land was appropriated for the purpose of erecting a meeting-house thereon. In 1727, after the erection of the meeting-house on the land, the town was incorporated and assumed the charge of its parochial affairs. The land around the meeting-house, was called "the common" or the "meeting-house land," was always open, and was intersected by several highways and other ways; it was also used as a site for horse-sheds and for all the ordinary purposes incident to a place of worship, and as a training-field. The town meetings had been held at the meeting-house. In 1754 and 1763, the proprietors voted to sell portions of the "meeting-house land," and they had also at different times exercised other acts of ownership over portions of this land. It was *held*, that the first parish, which was the successor of the town in its parochial capacity, might maintain trespass against a stranger who had ploughed up a portion of the land, which was used for purposes incidental to a place of worship. *First Parish in Shrewsbury* v. *Smith.* 297
2. *It seems*, that the vote of the proprietors, and the actual erection of the meeting-house, gave an actual possession of the land to the parish, which was sufficient to enable them to maintain trespass against a stranger. *Ibid.*
3. A number of persons met together and organized themselves as a voluntary religious society. No further meeting was held within six months, when the question was made, whether the society had not been dissolved. The records were afterwards burnt, but it did not appear that this was done by order of the society, nor had there been any corporate act evincing an intention to abandon their corporate powers. Many members filed with the clerk of the First Parish a certificate that they had withdrawn from the voluntary society, but it did not appear that there were no other members. It was *held*, that these facts did not prove that the voluntary society had been dissolved. *Oakes* v. *Hill.* 442
4. So, the omission for two years, to meet for parochial purposes and for the choice of officers, was *held* not to have operated as a dissolution of this society. *See note.* *Ibid.*
5. The recording officer of religious and other corporations may make copies of his records, and his certificate will be evidence of the verity of the copy; but it is no part of his duty to certify facts: — wherefore, where the clerk of a religious society certified simply, "that the plaintiff, at his own request, had ceased to be a member of the society," it was *held*, that the certificate was not legal evidence of that fact. *Ibid.*

PARTNER.

1. After the dissolution of a partner

Digitized by Google

ship between an active and a dormant partner, an action for the balance of an account was brought against both, in which the dormant partner pleaded payment, and the active partner, who was, by mutual consent, constituted agent to settle the partnership concerns, was defaulted. It was *held*, that an admission by the active partner, that such balance, in consequence of a mistake, had not been paid, made after the dissolution of the partnership, was competent evidence. *Bridge* v. *Gray*. 55

2. By a written contract between B and R, B agrees to furnish R for one year with wool, to be worked into satinets, and R is to deliver to B all the satinets which the wool will make, and is to find and pay for warps for the same. For working the wool, finding warps, &c., B is to pay R forty per cent. on the sales of the satinet. Each is to pay half the charges. B is to have the whole direction of the sales, and should he make sales himself he is to have one and a half per cent. on forty per cent. of the sales. In an action against B and R for the price of the warps furnished by the plaintiff to R, it was *held*, that B was not a partner of R, and consequently was not liable to the action. *Turner* v. *Bissell*. 192

3 The facts, that several persons associated together to run a line of stagecoaches, that they had a general meeting, and that debts were contracted on account of the company, do not prove a partnership as between themselves. *Chandler* v. *Brainard*. 285

4. A conveyance by a partner, of his interest in all the personal and real estate of the firm, to one of his copartners, does not *ipso facto* dissolve the copartnership; it is only evidence tending to show a dissolution. *Taft* v. *Buffum*. 322

See PRINCIPAL AND AGENT

PATENT RIGHT.

1. To warrant a patent, the invention must be useful, that is, capable of some beneficial use, in contradistinction to pernicious, or frivolous, or worthless. *Dickinson* v. *Hall*. 217

See BILL OF EXCHANGE &c., 4, 5, 7, 8

PILOT.

1. The *St.* 1829, *c.* 2, subjects to the penalty of fifty dollars a person who, not having first obtained a commission or branch, shall undertake to pilot *any* vessel (other than those which are particularly excepted) into or out of the harbor of Boston, without regard to her draft of water. *Hunt* v. *Card*. 135

2. As by the above-cited statute, American vessels engaged in the plaster trade between Boston and the province of Nova Scotia are not required to take a pilot, and as by the commercial arrangements between Great Britain and the United States, British vessels coming from the British colonies are admitted into our ports subject to no other duty of tonnage or impost, or charge of any description whatever, than would be levied on vessels of the United States coming from such colonies, British vessels engaged in the plaster trade between Boston and Nova Scotia may lawfully refuse to take a pilot into or out of the harbor of Boston. *Ibid*

PLEADING.

1. In an indenture between the plaintiff as agent of M of the one part, and the defendants and one T, since deceased, of the other part, reciting that the plaintiff, as such agent, had, with the consent of T, sold a schooner to B, one of the defendants, for $1950, of which sum $950 had been paid to the plaintiff, and that T claimed to own

Digitized by Google

a moiety of the schooner, the defendants and T covenant that they will pay the plaintiff $1000, the residue of the price, within one year, subject to the proviso, that if T shall within one year, by any legal process or arbitration that may be agreed upon between the parties, legally establish his title to such moiety, then the $1000 shall not be paid, and subject to the further proviso, that if at the end of one year any process for the purpose of determining the title of T shall be pending, then the payment shall be delayed until such process shall be determined, and if by the termination of such process it shall be found that T was the owner of a moiety, the $1000 shall never be paid. In an action of covenant on this indenture the plaintiff avers, that T did not, within one year, by any legal process or otherwise, establish his title, and that no process was depending and undetermined at the end of the year. The defendants plead, that T and the former master of the schooner were owners, as tenants in common, each of an undivided moiety, that the master sold her without authority to G, that G sold her to M, and that the plaintiff as M's agent sold her to B; that before this last sale T claimed a moiety as tenant in common with M, and that the indenture was entered into for the purpose of determining their conflicting claims; that T, in his lifetime, and since his death his administrator, offered to the plaintiff, within the year, and were always ready, to agree in the appointment of arbitrators or the commencement of any legal process, but that the plaintiff refused. It was *held*, that as T claimed to be tenant in common with M, no adverse suit could be brought to determine their respective rights; that the fair construction of the indenture was, that whether the controversy should be determined by arbitration or by a suit, it was to be done by the agreement of the parties to the indenture, and that if by refusing his assent, as well to a suit as to an arbitration, the plaintiff prevented T from complying with the conditions, he could not recover on the covenant; and consequently, that the plea was good in substance. *Lord* v. *Tyler*. 156

2. It was *held* likewise, that the plea, in alleging an unauthorized sale of T's moiety, so that no title to it vested in M, and also an offer to agree on a suit or an arbitration, was not bad for duplicity, for that the former allegation was not a ground of defence to the action, but either surplusage or merely inducement to the material allegation. *Ibid.*
3. A plea, alleging that the offer to agree on a suit or an arbitration, was made to M, instead of the plaintiff, was *held* to be bad. *Ibid.*
4. A plea, alleging that the plaintiff and T agreed that a suit pending between the former master of the schooner and an insurance company should be the legal process whereby T's right to a moiety should be determined, that that suit was discontinued without the knowledge of either of the parties to the indenture, and that afterwards the administrator of T offered to the plaintiff and was always ready to agree on another suit or an arbitration, was *held* to be good in substance, and not bad for duplicity; the first part being either surplusage or merely inducement to the material allegation. *Ibid.*
5. Where a deed of real estate was executed, with covenants of seisin and warranty, and an action was brought by the assignee of the grantee against the grantor for the breach of the covenant of warranty, the grantor pleaded, that he was not seised when the convey

Digitized by Google

ance was made, and that so the covenant of seisin was broken at the time of the execution of the deed; the assignee took issue on this fact. It was *held*, that the assignee had thus waived his right to object that the grantor was estopped to deny his seisin at the time when the deed was executed, and that the jury were at liberty to find the truth. *Bartholomew* v. *Candee*. 167

6. In trespass *quare clausum* the defendant pleaded a license; upon which the plaintiff took issue. *Held*, that the plaintiff might prove that the license was obtained by fraud, without replying fraud specially, a license so obtained being not voidable, but void. *Anthony* v. *Wilson*. 303

7. In an action of the case against a sheriff for a neglect of duty in not paying over money collected on an execution in favor of the plaintiffs, the declaration alleged, that the execution was delivered to the defendant; that he ought to have satisfied it out of moneys of the debtor, arising from the sale of his property made by the defendant, which property was attached by the defendant on the plaintiffs' original writ; and that the moneys arising from such sale were more than sufficient to satisfy the execution after paying off all previous attachments. It was *held*, that in order to bring the case within the *St.* 1804, *c.* 83, § 6, it should have been averred, that the sale was made by the defendant *virtute officii*, and that the plaintiffs' execution was delivered to the defendant before he had paid over the surplus money to the debtor. *Wheeler* v. *Willard*. 486

8. In an action on the case against a sheriff for a neglect of duty by Fisher, one of his deputies, the declaration alleged, that a writ had been delivered by the plaintiffs to Fay, another of his deputies, who attached thereon an equity of redemption and personal property belonging to the debtor; that the plaintiffs' execution was delivered to Fay, who satisfied it in part by a sale of the personal property, and afterwards presented it to Fisher, who had made a simultaneous attachment of the same equity on a writ in favor of another creditor of such debtor and had sold it on such creditor's execution; that Fay demanded of Fisher one half of the proceeds of the sale, to be applied to the payment of the plaintiffs' execution, having before and at the time of the sale notified to Fisher the simultaneous attachment under the plaintiffs' writ, and requested him to retain one half of such proceeds, to be applied to the payment of the plaintiffs' execution; yet that Fisher not regarding the notice, nor the demand, the plaintiffs had wholly lost the benefit of their attachment of the equity. It appeared, that one half of the proceeds of the sale much exceeded the amount due on the plaintiffs' execution. It was *held*, that the declaration was insufficient, inasmuch as there was no averment, that Fisher had any surplus money in his hands at the time of the demand by Fay, nor that the plaintiffs' attachment had been returned into court, nor that the plaintiffs' execution was delivered to Fisher. *Ibid.*

See MORTGAGE, 8.
SCIRE FACIAS, 1, 2, 3, 4, 5, 6, 7.

PLEDGE.

1 By a contract between H & L, lessees of a brick-yard, and E, it was agreed that E should make bricks in the yard, and pay H & L at a certain rate for the clay, and that H & L should purchase wood, sell the bricks, &c.; that the profit or loss should be divided

Digitized by Google

between them; and that H & L should have power to retain the bricks in their possession to the amount of all sums of money which they might from time to time advance to E. Afterwards E drew an order on H & L to pay one D what sums might be due to E from the sales of the bricks after deducting the amount due to H & L for their advances. Afterwards H & L assigned all their property to the plaintiffs, including their interest under the contract above mentioned, and the plaintiffs went into the brick-yard and gave E notice of the assignment, and he assented to it, and agreed to act as agent of the plaintiffs, who on their part agreed to make advances in the same way that H & L were to do under the original contract. The plaintiffs took possession of the brick-yard and of property therein, and by writing gave the charge of it to E, with directions to sell the bricks at retail for cash, and whenever a certain sum should be received, to deposite it in a bank to the plaintiffs' credit. The bricks were subsequently attached at the suit of a creditor of E. In an action of replevin by the plaintiffs against the attaching officer it was *held*, that the right of H & L to retain the bricks as security for advances to E, was assignable, with the consent of E, and that the plaintiffs had a lien which must prevail against the attachment. It was also *held*, that the order drawn by E was admissible in evidence, as tending to establish the original contract on the part of E, that H & L should retain E's part of the bricks as collateral security. *Macomber* v. *Parker*. 497

2. Although there cannot be a pledge, technically speaking, of a chattel not in existence, there may be an hypothecation, so that as soon as the chattel shall be produced the lien will attach. Thus where it was stipulated by a brick-maker, that the lessees of a brick-yard should retain the bricks to be made, as security for their advances to the brick-maker, it was *held*, that the bricks became pledged as fast as they were manufactured. *Ibid.*

3. Possession of a chattel by the vender or pledger is only evidence of fraud; which may be rebutted by proof that he held possession as the agent or servant of the vendee or pledgee. *Ibid.*

POOR.

Where a person who had been supported by his town as a pauper, had bodily health and strength, though of small mental capacity, and was able to earn more than enough to support himself, and had found an employer, it was *held*, that he was no longer a pauper; and consequently, where the town made a contract with the plaintiffs that they should take care of all the paupers belonging to the town, and be entitled to their services, it was *held*, that they were not entitled to the services of the person above described. *Wilson* v. *Brooks*. 341

POSSESSION.

If the respective owners of two adjoining lots of woodland not separated by a partition fence, cut trees beyond the boundary line, this mixed possession does not give to each the possession of the strip so cut over, as against a stranger, but the question of possession is to be determined by the true boundary line: nor can the owner of one of the lots regard as a stranger, a person who shows a *primâ facie* title to the other lot, although he do not trace his title to the original owner thereof. *Leach* v. *Woods*. 461

PRACTICE.

1. Where the parties had agreed that

Digitized by Google

a default should be entered, subject to the opinion of the Court, and that judgment should be rendered for the plaintiff for one of two sums, the Court nevertheless, on motion of the plaintiff, granted a new trial, holding such agreement to be subject to the order of the Court. *Shearer* v. *Jewett*. 232

2 Where a witness had testified to material facts on the part of the plaintiff without being sworn, through the inadvertence of the parties, and this circumstance came to the knowledge of the defendant and his counsel during the argument of the counsel, but after the witness had gone to his home in a distant town, it was *held*, that after a verdict for the plaintiff, it was too late for the defendant to object that the witness had not been sworn. *Cady* v. *Norton*. 236

See ACTION.
AMENDMENT.
ASSIGNMENT, 4.
NEW TRIAL, 2, 3.
SET-OFF, 1, 2, 3.

PRINCIPAL AND AGENT.

1 A line of stagecoaches was run by the two defendants from Barre through Holden to Worcester and back, and it was agreed that one of them should furnish and maintain horses and coaches and receive the money paid for the transportation of passengers between Holden and Worcester, and that the other should do the like between Holden and Barre. They hired a man to drive all the way from Barre to Worcester and back, for a certain sum per month and perquisites; and money was delivered by the plaintiff to this driver to carry from Barre to Worcester, but he absconded without delivering it. *Held*, that the driver was the servant of the defendants jointly, and that they were jointly liable to the plaintiff for the money. *Cobb* v. *Abbott*. 289

See LANDLORD AND TENANT, 1

PRINCIPAL AND SURETY

1. The sureties in a guardianship bond given by two guardians as principals, having become dissatisfied with their responsibility, took by way of security the written promise of a stranger, in which he acknowledged the receipt of a certain sum of money from one of the guardians and promised to apply it towards indemnifying the sureties from the bond. The guardians kept separate accounts, and from each of them there was due to the ward a balance, which the sureties were compelled to pay. The balances were severally less, but in the aggregate, more, than the sum mentioned in the written promise. In an action by the sureties upon this promise, it was *held*, that even if no money was received by the promisor, still there was a valid consideration for the promise, because the sureties were thereby diverted from instituting legal proceedings to obtain a discharge from their liability on the bond. *Drury* v. *Fay*. 326

2. But it was further *held*, that the promisor was estopped to contradict his acknowledgment of having received the sum of money mentioned in his contract. *Ibid.*

3. *Held* also, that the sureties were entitled to recover the whole of this sum, notwithstanding they had also taken security from the other guardian. *Ibid*

PROBATE COURT.

See EXECUTOR &c., 4, 5.

RELIGIOUS SOCIETY

See PARISH, 3, 4, 5.

Digitized by Google

SALE.

1. On an indictment for selling a lottery ticket, in which it was alleged that the sale was made to H and L, it appeared, that in pursuance of a previous agreement between them to go shares in a lottery ticket, H, in the presence of L, selected the ticket, from among a number produced by the defendant at the suggestion of H; that H and L paid their respective shares of the price, L laying his money down on the counter; that H kept the ticket, with the consent of L, till the drawing of the lottery, when, the ticket having drawn a prize of $2000, the money so drawn was paid by the defendant to H, who paid over to L his share; and that there had been no communication between H and L on the subject of the ticket from the time of the purchase till they were informed that the ticket had drawn a prize and they received the money. It was *held*, that this evidence proved a *joint sale* of the ticket to H and L according to the allegation in the indictment; and that it was immaterial, whether the identical money advanced by each purchaser, for the ticket, was paid to the defendant, or was received by one, and the payment for the ticket made from his funds. *Commonwealth* v. *Lang*. 76

2. A contract was made between K and H, for the joint purchase of 20,000 Russia mats, which were to be stored by H. Afterwards, on May 6, 1829, a new contract was entered into by the parties, which was as follows: "K bought of H 20,000 Russia mats, at 10 cents each, $2000. It is understood K is to pay $4 per month, storage for the above mats, from this date, and interest on the mats until paid for; and the said K is not to pay for said mats more than the amount indorsed on this bill, till the same are sold." On the back of this contract was an indorsement by H, of the same date, acknowledging the receipt of $1104·50 in cash and notes. On May 8, 1829, H caused the mats which had not been so paid for, to be attached on a writ in favor of one of his creditors. On May 13, 1829, K was summoned as the trustee of H, at the suit of W On June 5, 1829, K brought an action of trespass against the sheriff for attaching the mats, and recovered judgment for the value of the mats so attached. In a process of foreign attachment in which K was summoned as trustee of H, immediately after the amount of this judgment had been paid over to K, it was *held*, that the property in the mats vested in K, upon the sale to him on May 6, 1829; that the attachment of the mats, being a tortious act, in no respect affected such sale; and therefore that K was chargeable as the trustee of H when he was summoned at the suit of W, for the residue of the mats not paid for by him at that time. *Stone* v. *Hodges and Trs.* 81

3. Where, at a sale of goods for the non-payment of taxes, the collector of taxes became himself the purchaser, it was *held*, that such sale was voidable, at the election of the owner of the goods. *Pierce* v. *Benjamin*. 356

4. *It seems*, that the owner in such case, in order to maintain trover for the goods, must elect to annul the sale, before the commencement of the action. *Ibid.*

5. Where a vendor of chattels gave the vendee a writing in this form —"A. B. bought of C. D. &c. (enumerating the articles with their respective prices.) Received payment, C. D."—and the chattels were delivered to the vendee, but were returned to the vendor, and while in his possession were at-

Digitized by Google

tached as his property, it was *held*, that upon the suggestion of the sale being fraudulent, the possession by the vendor was not conclusive evidence of fraud, and that it was competent to the vendee to prove by parol evidence, that the conveyance was a mortgage to secure a debt due to him from the vendor. *Fletcher* v. *Willard*. 464

See EXECUTOR &c., 2.
PLEDGE, 3.

SCHOOL DISTRICT.

See ASSESSORS, 1, 2, 3.

SCIRE FACIAS.

1. An original writ was indorsed by I. B. B., who was not the plaintiff in the writ, and the defendant, having recovered judgment in the Common Pleas against the plaintiff for costs; sued out a writ of scire facias against I. B. B. to recover the same, in which it was alleged, by way of recital, that "I. C. B. indorsed the original writ in the said action." I. B. B. was defaulted in the Common Pleas, and the case being brought up to this Court on a motion in arrest of judgment, because it was not averred that the indorsement was made by I. B. B., it was *held*, that the scire facias in such a case was so far a judicial writ, that it was competent for this Court to look at the record upon which it was founded, and the misrecital was considered to be a mere misprision of the clerk and the motion in arrest was overruled. *M'Gee* v. *Barber*. 212
2. It is not necessary to allege that the defendant in the scire facias indorsed as agent or attorney, for the *St.* 1784, *c.* 28, § 11, having required that an original writ shall be indorsed by the plaintiff or by some agent or attorney whoever indorses, not being the plaintiff, is presumed to indorse as agent or attorney. *Ibid.*
3. Nor is it necessary to aver, that on the avoidance of the plaintiff in the original writ the indorser became liable, this being an inference of law. *Ibid.*
4. Nor is it necessary to aver negatively, that the judgment against the plaintiff in the original writ has not been reversed. *Ibid.*
5. It is necessary to aver, that such judgment has not been satisfied; and this is sufficiently stated by averring that the necessary measures (specifying them) have been taken to obtain satisfaction, and that they have proved unavailing. *Ibid.*
6. It is not necessary to aver, that by force of any law of the commonwealth the indorser became liable, the statute being a general law and the liability being merely an inference of law. *Ibid.*
7. It is not necessary to aver that the original writ was indorsed before service, for the allegation that it was indorsed, imports an indorsement, conformably to the statute, before service. *Ibid*

SEISIN AND DISSEISIN.

See CONVEYANCE, 6.
MORTGAGE, 10, 11, 12.

SET-OFF.

1. In assumpsit, the defendant, under the provisions of *St.* 1793, *c.* 75, § 4, filed a set-off, which merely stated, that the plaintiff was indebted to the defendant for "the amount of account *due as per books*, $10,000." It was *held*, that this was a sufficient "account," within the meaning of the statute, the object of such account being only to put on record notice to the plaintiff, that the defendant intends to avail himself of such set-off;

Digitized by Google

and that if the plaintiff is at a loss to understand from the set-off, what demands the defendant intends to offer in evidence, he may have specific information by a bill of particulars. *Jackson* v. *Hall.* 151

2 In the same action, the defendant, upon being required by the plaintiff, filed a bill of particulars of such set-off, among the items of which were three promissory notes of the plaintiff. It was *held*, that the defendant was limited by the words of the set-off, to such demands as were entered in his books, and that, as these notes were not shown to be so entered, evidence of them was inadmissible in set-off. *Ibid.*

3. Where a defendant, upon being required by the plaintiff, filed a bill of particulars of his account in set-off, and the plaintiff allowed it to be filed, and the evidence on the part of the defendant to be taken, without making any objection, it was *held*, that he was not thereby precluded from objecting at the trial to the admission of proof of claims specified in the bill of particulars, but which were not embraced by the account filed in set-off. *Ibid.*

See CORPORATION, 6.
INSOLVENT ESTATE, 2

SHERIFF.

See ATTACHMENT, 1, 4, 5, 6, 7, 8.
BAIL, 2.
LIEN, 5, 6, 7.
PLEADING, 7, 8.

SHIP.

See ACTION ON THE CASE.
AVERAGE, 1, 4, 5.

SPECIFIC PERFORMANCE

See EQUITY, 1. 2.

STAGE COACH.

See PARTNER, 3.
PRINCIPAL AND AGENT.

STATE PRISON.

1. In the statutes of 1817, *c.* 176, § 5, 6, and 1827, *c.* 118, § 19, 20, which provide that whenever any person who shall be convicted of any crime, the punishment whereof shall be confinement to hard abor "for any term of years," shall have been before sentenced to a like punishment, he shall be sentenced to punishment in addition to that by law prescribed for the offence of which he shall be convicted, the words *term of years* mean a period of time not less than two years. *Ex parte Seymour.* 40

2. In order to subject a convict to additional punishment, under *St.* 1817, *c.* 176, § 5, 6, (since repealed,) it was sufficient that the crime for which he was about to be sentenced was one punishable by confinement to hard labor for a term of years, but in regard to a former conviction, it must have been one upon which he was actually sentenced for a term of years, that is, a period not less than two years. *Ex parte Dick.* 86

3. A sentence as a common and notorious thief, pursuant to *St.* 1804, *c.* 143, § 3, although it may have been upon three simple larcenies neither of which separately would be punishable by hard labor for a longer term than one year, is a sentence for an offence punishable by confinement to hard labor for a term of years, within the meaning of *St.* 1827, *c.* 118, § 19, 20, subjecting the convict to additional punishment in certain cases. *Ex parte White.* 90

4 Subsequently to the enactment of *St.* 1832, *c.* 73, an information was filed in the Municipal Court, praying that additional punishment might be awarded against a convict in the State prison, and setting forth, first, a sentence to hard labor for a term of years and his discharge in 1824, secondly, a sen-

Digitized by Google

tence to solitary imprisonment for three days and to hard labor for one year, and his discharge in 1828, and thirdly, a sentence to hard labor for a term of years, upon which he was still detained; and thereupon he was sentenced to additional punishment by solitary imprisonment for one day and confinement to hard labor for seven years. It was *held*, that this additional sentence could not be sustained under St 1827, c. 118, § 19, 20, as a sentence upon a third conviction, but that it might be sustained under that statute as a sentence upon a second conviction. *Ex parte Stevens.* 94

STATUTES CITED AND EXPOUNDED.

STATUTES OF THE COMMONWEALTH.

1783, c. 37. Conveyance 224
—— c. 32. Executor and administrator 271
1784, c. 2. Insolvent estate 8, 271, 274
—— c. 28. Indorsement of writ 212
—— c. 41. Gaol bond 523
—— c. 72. Infant, apprentice 510
1785, c. 52. General field 276
—— c. 69. Divorce 181
—— c. 70. Tax 356
1788, c. 51. Mortgage 403
1791, c. 22. Tax 356
1793, c. 59. Poor 512
—— c. 75. Set-off 151
1797, c. 35. Deposition 285
1804, c. 143. Larceny 90
1808, c 65. Manufacturing corporation 69, 483
1811, c 85 Gaol bond 523
—— c 167 Gaol bond 523
1817, c 176. State prison 40, 86
1819, c 156. Mechanic's lien 49
1820, c. 45. Peddling 370
1823, c. 138. Assessors 362
—— c. 140. Equity jurisdiction 63
1824, c 119. Juror 196
1826, c 27. Usury 436
—— c. 143. Assessors 362
1827, c. 118. State prison 40 94
1828, c 143. Assessors 362
1829, c. 2. Pilot 135
1832, c. 73. State prison 95
—— c. 130. Exceptions 370
1834, c. 189. Action 192

TAX.

1. If a distress for non-payment of taxes be sold by the collector after the expiration of the time limited by *St.* 1785, *c.* 70, § 2, and *St.* 1791, *c.* 22, § 2, for making such sale, the delay renders the collector a trespasser *ab initio;* and trover will lie against him, in favor of the owner of the goods sold, although no demand thereof be made before the commencement of the action, the tortious taking of personal property being a conversion *Pierce* v. *Benjamin.* 356
2. In such an action it appeared, that the collector applied the proceeds of the sale, in part-payment of the tax, and that the owner subsequently paid him the residue and required a receipt for the whole amount of the tax, in order that he might settle with his landlord. *Held*, that this was not a waiver of the right to bring the action. *Ibid.*
3. In such action it was *held*, that the measure of damages was the value of the goods, deducting the amount applied by the collector to the payment of the tax. *Ibid.*

See ASSESSORS, 1, 2, 3.
SALE, 3, 4.

TENDER.

A plea of tender is not supported by proof of a tender of a promissory note due from the plaintiff to the defendant. *Cary* v. *Bancroft.* 315

TOWN.

See WAY, 2.

TRESPASS.

See PARISH, 1, 2.
TAX, 1.

Digitized by Google

TRUSTEE PROCESS.

1 By the answers of one summoned as trustee, it appeared that he was a lessee at will of a paper mill; that by his agreement with the principal defendant as a laborer in the mill, the defendant was to receive his wages in orders, not negotiable, drawn by the respondent upon the owners of the mill, and in no other way, and if the defendant should be indebted to the owners at the time when an order was drawn, a discharge of such debt should be equivalent to an acceptance and payment of the order to the same amount; and that the defendant had not demanded any order for the wages due to him at the time of the service of the trustee process. There being no actual fraud in the contract, it was *held*, that the respondent was not chargeable as trustee. *Willard* v. *Butler & Tr.* 550

See ASSIGNMENT, 2, 3.
SALE, 2.

USAGE.

See INSURANCE, 2, 3.

USURY.

1 In an action upon a promissory note, on which usurious interest had been taken and reserved, it was *held*, that under *St.* 1826, *c.* 27, the interest reserved was to be computed to the time of the verdict and to be added to the principal; that from this amount was to be deducted threefold the whole interest taken and reserved, computed as above; and that the plaintiff was entitled to judgment for the balance, with interest thereon from the time of finding the verdict to the time of rendering the judgment. *Parker* v. *Biglow.* 436

2. What would have been the effect of fraudulent conduct on the part of the defendant, or of unnecessary delay caused by him, for the purpose of increasing the forfeiture, *quære.* *Ibid.*

VERDICT.

See NEW TRIAL, 1, 2, 3.
WAY, 1.

WAY.

1. Where several parties aggrieved by the laying out of a highway, join in a petition for a jury, the verdict is in effect several distinct verdicts on the several rights of the parties, and it is competent to the Court of Common Pleas to accept and affirm the verdict as to one petitioner and set it aside as to another; and where the verdict is set aside as to one of the petitioners it is the duty of the county commissioners to grant him a new jury. *Anthony* v. *County Commissioners of Berkshire.* 189

2. In pursuance of authority from the legislature, a canal was located in such a manner as to include a county road, and was partly made, but afterwards, during a suspension of labor upon the canal, a surveyor of highways in the town in which the road lay, made the road passable, but not safe. It was *held*, that the road had been discontinued; and consequently, that the town was not responsible to a person injured by reason of its being out of repair. *Tinker* v. *Russell.* 279

WILL.

See DEVISE, 14, 15.

WITNESS.

1. If a witness offered by the plaintiff has become interested in the event of the suit by a *bonâ fide* contract with the defendant, made in the regular course of business and without any intention on the part

Digitized by Google

of the defendant or the witness to deprive the plaintiff of his testimony, he is incompetent, although such interest was created after the plaintiff had become entitled to his testimony. *Eastman* v. *Winship*. 44

2 In an action by an indorsee against W on two promissory notes, one of which was made by W and indorsed by J, and the other was made by J and indorsed by W, it appeared, that after the execution of the notes but before their maturity, J had failed in business and assigned his property for the benefit of his creditors, and had been in consequence thereof released by W from all liabilities to him. It was *held*, that J, who was offered as a witness by the plaintiff, was not incompetent, as being interested in the event of the suit; for he would still be liable to the plaintiff, whether the plaintiff recovered judgment against W or not, and the judgment in this suit could not be given in evidence in an action against J. *Ibid.*

See COSTS.
INDICTMENT, 2.
PRACTICE, 2.

WRITS, INDORSEMENT OF.

See SCIRE FACIAS, 1, 2, 3, 4, 5, 6, 7

END OF THE FOURTEENTH VOLUME.

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

HARVARD LAW LIBRARY

Digitized by Google

Digitized by Google